Central Law Journal.

ST. LOUIS, MO., JUNE 12, 1903.

RIGHT TO RECOVER ON A MORTGAGE WHICH HAS BEEN TRANSFERRED BY THE MORTGAGEE TO, OR EXECUTED IN FAVOR OF, A RESIDENT OF ANOTHER STATE, FOR THE PURPOSE OF EVADING TAXATION.

In a recent case in Indiana, involving the subject above stated, which our readers will remember as having been exhaustively discussed in several previous editorials, the CENTRAL LAW JOURNAL comes in for the equivocal distinction of being cited as authority but not followed. Callicott v. Allen (Ind. App.), 67 N. E. Rep. 196. In this case a mortgage was executed by plaintiff's grantor to defendant, the latter having the mortgage made out in the name of a third party in another state and by him transferred back to defendant for the express purpose of evading taxation thereon. In a suit to set aside the mortgage as a cloud upon the title, the court, in refusing to grant the relief requested, held that a mortgage was not vitiated nor rendered unenforceable on grounds of public policy because of an express provision therein enabling the mortgagee to escape taxation.

It will be remembered from our former discussions (55 Cent. L. J. pp. 121, 201 and 261) that the authorities on this question were evenly divided, two cases asserting that such a provision in a mortgage rendered it unenforceable because infecting it with an inseparable illegality (Drexler v. Tyrrell, 15 Nev. 114; Sheldon v. Pruessner, 52 Kan. 579, 35 Pac. Rep. 204); and two cases taking the position of the principal case and asserting that such a provision is not identical with the mortgage transaction and does not therefore taint it with its illegality. (Nichols v. Sewing Machine Co., 27 Hun (N. Y.), 200; Crowns v. Forest Land Co., 99 Wis. 103, 74 N. W. Rep. 546.) In our former discussions of this subject we have followed and approved the first proposition, and the two cases on which it rests for support, not without recognizing, however, the difficult nature of the question itself. In discussing these two cases (Drexler v. Tyrrell, *supra*, and Sheldon v. Pruessner, *supra*), the Indiana Appellate Court said: "These two cases are the leading ones upon the question involved, and the only ones which have come to our attention sustaining the theory of appellant. In vol. 55 of the CENTRAL LAW JOURNAL, at pages 121, 201 and 261, are three articles by the editor approving these cases. The two cases cited are not authority in this state, and we do not think the decisions rest upon sound reason or good law." The court then advances a theory of its own which, being somewhat new, at least in the manner in which the court puts it, is worthy of being prominently set forth. It is as follows:

"Will a court of equity declare void the mortgage described in the complaint on the ground that it was executed and assigned in the manner disclosed for the purpose of avoiding and escaping taxation? Fraud vitiates all contracts, but this rule should be applied to contracts superinduced by fraud on the part of the contracting parties, which has affected his individual rights. To illustrate: A and B enter into a contract, with which they are entirely satisfied. Neither of them is overreached, and they each get all the consideration for which they contracted. In such contract, however, A, with sinister motives and with fraudulent intent, has perpetrated a fraud on C. Can B defend against his contract on the ground that A has defrauded C? There can be but one answer to this proposition, and that must be in the negative. The law will compel B to keep the covenants of his contract, and in like manner put into the hands of C the right to pursue his individual remedy against A for fraud perpetrated upon him. If the legal principle declared by the illustration which we have given is correct, the decision of the question presented becomes simple. Taking the facts pleaded as true—which we must for purposes of the demurrer—we find two parties entering into a contract. They both fully understand the terms of the contract, and they each received all they contracted for. The mortgagor was not misled in any way by false or fraudulent representations. The appellant now stands in the same relation to the contract that his grantor occupied, and he, too, received what he contracted for, and was not misled by any false or fraudulent misrepresentations on the part of the appellee. Up to this point, who has been injured in his or her individual rights? Certainly none of the parties to the transaction. The commonwealth, in its several govern-

mental departments, is the only injured party, and it has not lost its remedy, for the law is ample in such cases to protect its rights. While the state was not a party to the contract, its rights were infringed in that appellee, by her conduct, escaped the payment of her just proportion of taxes which the law casts upon her property. It is a maxim of law that there is no wrong without a corresponding remedy. In such cases, who can enforce the remedy? Evidently, the wronged or injured party. If appellant can succeed in having the mortgage canceled, will his injury thereby be avenged? Not his, for we have seen that he has none to avenge. Should we hold that he was entitled to have it canceled, the state would have additional injury thrust upon it, for it would be deprived of adequate assets out of which it could collect the taxes, which can, under the law, be assessed, for the mortgage is chattel, and subject to sale. These considerations lead us to the conclusion that under the facts pleaded the state occupies the position of C in the illustration given above. Appellant is in the attitude of seeking a court of equity to cancel a mortgage on his property which he has not paid, and which is a just burden upon it, and which he knew was there when he took the title, solely upon the ground that appellee has attempted to defraud the state out of a just proportion of its revenue. To declare such a rule would be equivalent to saying that, if the payee of a promissory note sequesters it from the taxing officers, a payor could successfully defend against its collection on the ground that he had defrauded the state by not returning it for taxation. Where a mortgage is given to secure a note, the note, and not the mortgage, is assessable for taxation."

The argument of the court is a plausible one and, after leaving its main premise upon which it is founded, carries the student with it by its exact logic. But the premise is faulty. The court states the proposition that if A and B enter into a contract in which and by means of which B is able to perpetrate a fraud upon C, that in such case A has no defense to the contract because of the fraud upon C. We respectfully maintain that this premise is faulty, in the first place, because, in itself, it is not an accurate statement of the law, and second, because the rule thus incorrectly stated has no application where the intention of B, *known to and assisted by A*, is to do an act that is contrary to public policy.

In the first place, it is not always the rule that where plaintiff has suffered no damage affirmative relief will not be granted. Thus, it has been held in a recent case, a very similar one to the hypothetical case stated by the court, that where A makes a contract with B which perpetrates a fraud upon C, A can have the contract set aside. Brett v. Cooney (Conn.), 53 Atl. Rep. 729. In this case the plaintiff had made an oral agreement with his neighbor not to sell his summer residence to any one who would use it for an improper purpose. To carry out this moral obligation, he refused to sell to the defendant. Thereupon the latter employed an agent, who, by fraudulently representing that his purchase was for an unobjectionable third person, obtained a deed and conveyed over to the defendant. The plaintiff received his own price for the property, but in spite of the absence of damage to the plaintiff, the court set the deed aside. In speaking of this case the "Harvard Law Review" says; "In spite of the vast amount of judicial consideration of the subject of fraud, it has apparently remained for a recent case to raise the interesting question whether a suit for rescission on the ground of fraud may not be maintained although there is no damage to the plaintiff, where there is damage to a third party."

But even if the principle, thus inaccurately stated by the court in this Indiana case, were true, the deductions of the court are not warranted, the principle itself having no application to a case where the transaction, which B is able to consummate by the assistance of A with a third party, is against public policy. The question is not as to the fraud upon the United States, for which the latter has a right of action, but, independent of the right of the third party, the further question confronts us, whether the act contemplated in and of itself is so tainted with illegality as to render the whole contract void. For instance, we may very legitimately and pertinently in this kind of a case, invoke the rule invalidating a loan made by A to B where A has advanced the money with the direct intention of assisting B in a gambling speculation with third par-

ties. Tyler v. Carlisle, 79 Me. 210; Waugh v. Beck, 114 Pa. St. 422; Oliphant v. Markham, 79 Tex. 543, 15 S. W. Rep. 569, 23 Am. St. Rep. 363; Appleton v. Maxwell, (New Mex. 1901) 53 Cent. L. J. 428, and note. Thus in Oliphant v. Markham, *supra*, the court held that, "while simple knowledge of what the borrower was going to do with the money would not defeat the lender's right to recover, he could not recover if he had taken any *active part* in the gambling contract, such as depositing the loans as margins, bringing the parties together, etc." In the case of Waugh v. Beck, *supra*, the plaintiff furnished money to the defendant, knowingly and with the intention of assisting plaintiff in a gambling transaction, although he himself was not concerned in it and was to receive no gain from it. The court said: "When a man lends money for the express purpose of *enabling* another to commit a specific unlawful act, and such act be afterwards committed by means of the aid so received, the lender is a *particeps criminis*."

While the above cases are not strictly in point with the transaction involved in the subject before us, where, by means of the direct aid of the mortgagor, the mortgagee is enabled to escape taxation, the same principle is evidently applicable. As we have often said before in defending our position on this question, the mere knowledge or lack of knowledge of the mortgagor that, after he had executed the mortgage, the mortgagee did or would have it transferred to a third person or make any other arrangement, after the mortgage transaction, by which he might escape taxation on it would not effect the contract of mortgage because the illegal act of the mortgagee was committed independent of and received no manner of assistance from the mortgage contract. But, on the other hand, where the provision for enabling the mortgagee to evade taxation is made an integral part of the mortgage, and the mortgagor, at the mortgagee's suggestion, thus knowingly and intentionally assists the latter to violate the law, the whole contract becomes so tainted with the illegality as to be absolutely unenforceable "without legalizing an illegality." True, the United States has its remedy for the recovery of the taxes out of which it has been defrauded; true, indeed, the criminal law is in a position to demand the punishment of the man who has thus deliberately and treasonably purposed to defraud the revenues of the state. But these facts do not in the least diminish the vitiating effect of the illegal stipulation itself which has been incorporated in and deliberately made a part of the contract. The same act which is punishable under the law as a crime or a misdemeanor, or which would subject the offender to a fine or penalty, may at the same time invalidate a contract, into the consideration or execution of which its illegality has so vitally entered as to be incapable of separation.

We have no hesitancy in saying that, after very mature reflection, we can by no effort bring ourselves to doubt that the position assumed by the Nevada and Kansas courts upon this question is absolutely impregnable when tested by sound reason and the fundamental principles of law. The fact that some self-conscious text writer, with the oratorical flourish of a jury pleader, condemns the result arrived at in these cases because of the *gross injustice* (*?*) it works upon one who has so skillfully cheated the state out of its revenue, should not be permitted to blind the court to the *inherent* illegality with which the contract itself is infected by the treasonable provision enabling the mortgagee to carry out a purpose, not only contrary to public policy, but damnable in itself and destructive of the the very foundations of government.

NOTES OF IMPORTANT DECISIONS.

INJUNCTION—RIGHT TO ENJOIN MULTIPLICITY OF GARNISHMENT PROCEEDINGS INSTITUTED FOR THE PURPOSE OF HARASSING DEFENDANTS.—Collection agencies have more than one way of making a dun, but none of their methods are more contemptible than that condemned in the recent case of Siever v. Union Pacific Railway Co. (Neb.), 93 N. W. Rep. 943. In this case a debtor working on a salary, the amount of which was exempt by statute from legal process, was subjected by his creditor to a multiplicity of garnishment proceedings, evidently for the purpose of forcing him to pay the bill by annoying his employer and making him liable for attorney's fees in defending the suits. The defendant brought an action against his persistent creditor enjoining him from prosecuting, what he evidently had set upon to do, a multiplicity of proceedings in garnishment to subject his wages to the payment of a judgment against him, such wages being exempt by statute. The trial court granted the injunction, and in sustaining the decree, the Supreme Court of Nebraska, said: "The

facts pleaded and proved by the appellee surely call for the interposition of a court of equity, and demand the relief prayed for. It cannot be successfully asserted that the appellee had an adequate remedy at law in this case. The court found that his wages, sought to be subjected by the proceedings complained of to the payment of the judgment, were absolutely exempt to him by law. The appellants knew this as well as he did, and yet, by a series of garnishment proceedings, amounting to a persecution in this case, they sought to compel him to pay the judgment out of such exempt money, or expend it all in protecting his legal right thereto. Not only this, but they evidently sought to annoy and harass his employer until he must pay, or perhaps lose his employment. Again, it may be fairly assumed that, by suing out a number of writs of garnishment, appellee would at some time be unable to protect his rights, or the company would inadvertently default, and an order would thereupon be obtained which would result in compelling it to pay the money into court, leaving it still liable to pay the wages to appellee, or perhaps altogether deprive him thereof. Against such iniquitous proceedings there is no adequate remedy at law, and such practices should receive our severest condemnation." When the property of a debtor is exempt, he is entitled to the possession of it, and should be protected in this possession in the most expedient manner. Cunningham v. Conway, 25 Neb. 617, 41 N. W. Rep. 452; Johnson v. Hahn, 4 Neb. 149. Appellee was entitled to the decree to save him from being harassed by a multiplicity of suits. Johnson v. Hahn, *supra;* Uhl v.May, 5 Neb. 161; Normand v. Otoe County, 8 Neb. 21; Touzalin v.City of Omaha, 25 Neb.824, 41 N. W. Rep. 796; Schock v. Falls City, 31 Neb. 605, 48 N. W. Rep. 468; Morris v. Merrell, 44 Neb. 430, 62 N. W. Rep. 865.

HOSPITALS—WHEN IS A HOSPITAL "CHARITABLE" SO AS TO EXEMPT IT FROM LIABILITY FOR THE NEGLIGENCE OF ITS EMPLOYEES.—It has now been settled, although not without some dispute, that a charitable institution, in the absence of allegation or proof of negligence in their selection, is not liable for the negligence of its servants. The only real difficulty in the late cases now revolves around the question of what is and what is not a charitable institution. This question, so far as it relates to hospitals, is discussed in the recent case of Brown v. La Societe Francaise, 71 Pac. Rep. 516. In this case the defendant society, previous to its incorporation, was a voluntary association, and thereafter incorporated "on the basis of mutuality for the treatment of sick members," and for the purpose of securing to its members, without payment otherwise than of dues, medical and surgical treatment. There was no provision in its by-laws for the assistance of others except paying patients, or sick persons, not members, admitted to treatment for agreed compensation. In this case, plaintiff contracted to pay $50.00 for an operation and $3.00 a day for room, board and attendance. The operation was not successful due to the negligent and unskillful conduct of defendant's surgeon, for which plaintiff brought this action. The court held that the defendant was an association for mutual profit and was, therefore, liable to a patient treated for pay for the negligence of its physicians in treating such patient. The court said:

"We have, therefore, to consider only the question as to the alleged charitable character of the society. From the by-laws of the defendant, of date May 10, 1854, it appears that the society was originally organized as a voluntary association, but was afterwards incorporated by the filing of a certificate of election of trustees, June 7, 1854 (Hitt. General Laws, art 1024); and on May 5, 1895, new by-laws were adopted. From these it appears that 'the society is established on the basis of mutuality for the treatment of sick members,' or, as more specifically provided for the purpose of securing to its members (without payment otherwise than of dues), medical and surgical treatment, including the services of its physicians, surgeons, apothecaries, dentists, nurses, etc., and also medicines. Nor do we find in it any provision for assistance to others except to paying patients, or sick persons, not members admitted to treatment for agreed compensation. It is therefore merely an association for mutual profit or benefit, similar in its essential nature to other societies formed for such purpose. In reaching this conclusion we have not left out of view the original by-laws of the society, which are apparently much relied on by the appellant. But, assuming it was within the powers of the society to adopt the new by-laws (about which there seems to be neither doubt nor dispute), the former must be regarded as superseded by the latter, and therefore as immaterial to the question involved, which is as to the present character of the society. Our conclusion, however, would be in no way affected were the society still operating under its original by-laws. These, indeed, permit, and even contemplate, the exercise of charity as one of the aims of the society; but there is nothing in them requiring the application of the funds of the society to such purposes; nor can the funds contributed by the members be regarded otherwise than as, beneficially, their own property."

To same effect see the following authorities: Gorman v. Russell, 14 Cal. 531; *Id.*, 18 Cal. 688; Donnelly v. Boston Catholic Cemetery, 146 Mass. 166, 15 N. E. Rep. 505; Coe v. Washington Mills, 149 Mass. 547, 21 N. E. Rep. 966; Babb v. Reed, 5 Rawle, 152, 28 Am. Dec. 650: Texas & Pac. Coal Co. v. Connaughton (Tex. Civ. App.), 50 S. W. Rep. 173–175.

A line of authorities sustaining an apparent exception relate to hospitals maintained by railroad companies for the free treatment of its employees, partly supported by monthly deductions

from the pay of the latter, and partly by the company, and hold that such hospitals are to be regarded as charitable institutions. U. P. R. R. Co. v. Artist, 9 C. C. A. 14, 60 Fed. Rep. 365, 23 L. R. A. 581; Pierce v. U. P. R. R. Co., 13 C. C. A. 323, 66 Fed. Rep. 44; Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. Rep. 95. See also 40 Cent. L. J. 208; 51 Cent. L. J. 280; 53 Cent. L. J. 62, 224.

SCHOOLS AND SCHOOL DISTRICTS—JURISDICTION OF SCHOOLMASTERS OVER CHILDREN OUT OF SCHOOL. — It is universally conceded that the ordinary constitutional protection of liberty does not apply to the *parento-filial* relation. Minor children are subject to many discretionary restraints which would not be tolerated as to adults; and are even liable to what in the case of adults would be ranked as personal indignity and assault. It is the general rule of law that parents may administer reasonably corporeal punishment; and they may even delegate the right to administer such punishment to their children. Rowe v. Rugg, Iowa, 91 N. W. Rep. 903. Schoolmasters also, to a considerable extent, may act *in loco parentis;* and such fiduciary parental relation sometimes will excuse acts for the protection of children which indirectly affect the property interests of third persons and which might be classed as wanton and inexcusable interference, if all the parties concerned were adults. A recent illustration is afforded by the decision of the Supreme Court of Michigan in Jones and wife v. Cody, December, 1902, 92 N. W. Rep. 495.

In the comparatively early Massachusetts case of Sherman v. The Inhabitants of Charlestown (8 Cush. 160), it was held that "the general school committee of a city or town have power, under the laws of this commonwealth, in order to maintain the purity and discipline of the public schools, to exclude therefrom a child whom they deem to be of a licentious and immoral character, although such character is not manifested by any acts of licentiousness or immorality within the school." This ruling was made although the action was founded on a statute expressly providing that any child unlawfully excluded from public school instruction, in the commonwealth, may recover damages therefor in an action on the case brought in the name of the child, by a guardian or next friend, in any court, etc., against the city or town, by which such public school instruction is supported. In Lander v. Seaver, in the Supreme Court of Vermont (32 Vt. 120), it was held that although a schoolmaster has in general no right to punish a pupil for misconduct committed after the dismissal of school for the day and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school and to subvert the master's authority. In Deskins v. Gose, in the Supreme Court of Missouri (85 Mo. 485), it was held that a rule forbidding scholars from quarreling and using profane language on their way home is reasonable and needful, and the teacher can punish them for its infraction.

In the recent exposition of this policy by the Supreme Court of Michigan in Jones v. Cody, *supra*, it was held that a principal of a public city school, enforcing an order of the board of education requiring pupils to go directly to their homes at the close of school, enacted under a statute conferring authority on the board to make rules relative to the good government of the schools of the city, is not liable for damages sustained by an owner of a store near the school by reason of a loss of trade in consequence of such enforcement. The plaintiffs were the proprietors of a confectionery shop in which children were wont to loiter after the dismissal of school. The Supreme Court of Michigan does not waste many words in arriving at the obviously correct conclusion that no cause of action existed.

The following is from the opinion:

"The rule and the method of enforcing it are reasonable, unless it be the law that those in control of our public schools have no jurisdiction over pupils outside the schoolhouse yard. It is not only the legal right, but the moral duty, of the school authorities to require children to go directly from school to their homes. All parents who have a proper regard for the welfare of their children desire it. The state makes it compulsory upon parents to send their children to school, and punishes them for failure to do so. The least that the state can in reason do is to throw every safeguard possible around the children who in obedience to the law are attending school. The dangers to which children are exposed upon the streets of cities are matters of common knowledge. Humanity and the welfare of the country demand that a most watchful safeguard should, so far as possible, accompany children, when required or allowed to be on the streets. Parents have a right to understand that their children will be promptly sent home after school, and to believe that something untoward has happened when they do not return in time. In no other way can parents and teachers act in harmony to protect children from bad influences, bad companionship and bad morals. No trader or merchant has the constitutional right to have children remain in his place of business, in order that they may spend money there, while they are on their way to and from school. The liberty of neither the children nor parent nor trader is at all unlawfully restrained by this rule and its reasonable enforcement." — *New York Law Journal.*

PLEADING AND PROOF OF INSANITY IN CRIMINAL CASES.

Pleading Insanity. — It is contended by some authorities that insanity should be offerred in evidence under the general issue—not guilty.[1] Authorities holding this view contend that as the defendant's sanity is impliedly charged in the indictment the same is put in issue by the plea of not guilty. There is legal support for this view in the general principles of pleading, since whatever is *necessarily* implied in a pleading is as much put in issue by a traverse thereof, as that which is expressed in terms.[2] Still, in preparing his plea and proof, the defendant looks only to what is expressed in terms in the pleading; and so also with the plaintiff, in replying to a plea. So that, if under a plea of the general issue the defendant be allowed, without notice given, to offer special evidence of insanity, the prosecution might be taken by surprise, and utterly unable on the instant to meet this evidence, which, if the same had been stated in a special plea, it might have answered without difficulty.

The writer was of counsel in a capital case wherein the court compelled the defendant to admit of record the killing, before the plea of insanity would be received. Of course, this was going too far, for as the great Blackstone says: "In criminal prosecutions, *in favorem vitae*, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court, still, he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, *not guilty*. For the law allows many pleas by which the prisoner may escape death, but only one plea in consequence whereof it can be inflicted; viz., on the general issue, after an impartial examination and decision of the fact by the unanimous verdict of a jury."[3] So the prisoner has a legal right after his special plea of insanity is found against him to plead over the general issue.

It may be said that this filing of a special plea of insanity, and if this is overruled, filing the general issue, gives the defendant two trials for one and the same offense, and therefore gives the defendant more than he is entitled to; yet this is just what the common law gives the defendant in all cases where he pleads a special plea and the same is found against him. The practice is generally, when the defendant pleads both a special plea in bar and the general issue, for the court to instruct the jury to pass on the special plea first, and to disregard the general issue, if they find the special plea for the defendant. But a verdict of guilty without noticing the special plea would be erroneous. In some states, and perhaps in England, the practice is, where the general issue and a special plea are pleaded together, not to try them together, but to submit the special plea to the jury first.[4]

The practice of pleading insanity special, along with the general issue in criminal cases, has this further advantage, that, if the defendant is acquitted on the ground of insanity, the record will furnish evidence of the fact which cannot be disputed, so that the law which requires the defendant acquitted of a criminal charge on the ground of insanity to be forthwith sent to the insane asylum, this law can, in such case, be at once executed without more done; whereas, if the insanity is offered in evidence under the general issue, there is no positive evidence that the jury based their verdict on this fact alone; so that still a writ *de lunatico inquirendo* would be required.

Proof of Insanity.—It is declared to be the modern law that "where facts which are made up of a great variety of circumstances, or combination of appearances, incapable of full description, may be shown by the opinion of ordinary witnesses whose observation had been sufficient to justify it." And it has for sometime been declared to be the law, overruling the old idea, that any witness may state how the defendant impressed him, as being either sane or insane. This is only an application of that more general rule of evidence, which declares, that any witness may state how things seen by the witness affected

[1] Bishop Crim. Procd., Vol. 2, p. 302, § 669; The State v. Smith, 53 Mo. 267; The State v. Crawford, 11 Mass. 32; Westmorland v. The State, 45 Ga. 225.

[2] Chitty on Pleading, Vol. 1, p. 476.

[3] Blackstone's Com., Vol. 4, p. 335.

[4] Lee v. The State, 26 Ark. 260; Faulk v. The State' 52 Ala. 415; Rex v. Roche, 1 Leach, 4th Ed., 134; Commonwealth v. Merrill, 8 Allen, 545; Dominick v. The State, 40 Ala. 680; Allen v. The State, 42 Fed. Rep. 420.

him, and how they appeared, either generally or with reference to some particular subject of inquiry.[5]

The question as to the sufficiency of the proof of insanity is not altogether settled. The adjudication on that subject may be divided into three classes, as follows: First, it has sometimes been maintained that the defendant has not the burden of proof, and that the presumption of sanity only arises in the absence of all proof to the contrary, that his only duty is to introduce evidence tending to cast uncertainty upon the question and thereby raise in the minds of the jury a reasonable doubt as to his sanity, and that such reasonable doubt is a sufficient ground for an acquittal, unless overcome by affirmative proof of his sanity adduced by the prosecution. Second, in other states it is the declared doctrine that insanity must be proved by the defense beyond a reasonable doubt. Third, the more modern doctrine is that although the defendant has the burden of proof, he may establish his insanity by a preponderance of the evidence, or by any evidence that satisfies the jury that he is insane, regarding the same measure of proof necessary as in civil cases,

What proves the sanity or insanity of the defendant is to be determined by the jury from the evidence according to facts of the particular case, and it is for the jury to say whether the defendant is sane or insane, that is, they are to judge from all the facts before them, and make up their minds on this, as they would on any other question.[6] No man can know the mind of another man except from his outward acts, and from his conversation—verbal acts—and all these are liable to be feigned and simulated; so, until science has advanced to that point when it can furnish positive proof of mental conditions, guilty persons will be turned free, as insane, and insane persons will suffer the extreme penalty of the law as being sane. But the pleadings of humanity demand that in all cases when insanity is pleaded as a defense to a criminal charge the same should receive the most earnest and particularly careful consideration, and in no case should the accused be condemned until his sanity has been made to appear so plainly, that he that runs may read, and in all cases when the mind is not satisfied beyond the suggestion of a doubt of the defendant's sanity to find for the defendant, and then after the trial is ended, confine him in a home for the insane. Following these suggestions, there will no more be presented the spectacle of a poor, helpless, babbling lunatic dangling from a gallows as was seen in the city of Washington some fifteen or more years past.

LINTON D. LANDRUM.

[5] State v. Donnelly, 69 Iowa, 705; State v. Stackhouse, 24 Kan. 447; Wise v. The State, 85 Am. Dec. 595; People v. Fernandez, 25 N. Y. 49; Kennedy v. Com., 14 Bush. (Ky.), 340; State v. Baldwin, 36 Kan. 1; Jacobs v. Com. (Pa.), 15 Atl. Rep. 465; State v. Jones, 64 Iowa, 349; Coyle v. Com., 100 Pa. St. 573; State v. Terrel, 12 Rich. (S. Car.), L. 321; People v. Semond, 19 Cal. 275; Seguara v. State, 16 Tex. App. 221.

[6] Genting v. State, 66 Ind. 94; State v. Barlett, 43 N. H. 224; Graves v. State, 45 N. J. L. (16 Vr.) 347; Boswell v. State, 63 Ala. 307; State v. Lawrence, 57 Me. 574; Massengale v. State (Tex. App.), 6 S. W. Rep. 35; Goodwin v. State, 96 Ind. 550.

CONSTITUTIONAL LAW — ALIMONY AS A VESTED RIGHT PROTECTED FROM SUBSEQUENT MODIFICATION.

LIVINGSTON v. LIVINGSTON.

Court of Appeals of New York, February 10, 1903.

1. Where defendant in divorce is adjudged to pay a certain sum annually for plaintiff's support and that of her children, it creates substantial rights, which constitute property of the plaintiff, of which she cannot be deprived without due process of the law.

2. Laws 1900, ch. 742, permitting the court, on application of either party to an action of divorce, at any time after final judgment, "whether heretofore or hereafter rendered, to annul, vary or modify" a direction of a judgment in divorce requiring defendant to provide for the support of plaintiff, and for the education and maintenance of the children of the parties, is unconstitutional, in so far as it attempts to confer a power on the court to annul or vary valid and final judgments entered before the passage of the act.

O'Brien, Haight, and Vann, J. J., dissenting.

GRAY, J.: This was an application by the defendant for an order modifying and varying the direction as to alimony contained in a judgment which had dissolved the marriage of the parties. The application was granted, and an order was made changing the provisions of the judgment of divorce by reducing the amount of alimony ordered to be paid by the defendant to the plaintiff from $4,000 to $3,000 a year. This order was reversed by the appellate division, and the motion for the modification of the judgment was denied, whereupon the defendant appealed to this court.

The judgment divorcing these parties was rendered in 1892. It decreed the custody of their children to the wife, who was plaintiff in the action, and it ordered the defendant to pay to her during her lifetime the sum of four thousand

dollars a year, in equal monthly payments in advance for her support and that of the children. No appeal from the decree was prosecuted by the defendant, and it contained no provision reserving to the court the right thereafter to alter it; nor did the statute then in force confer any such power, although it existed where the action was for a separation. Code Civ. Proc. § 1771. What jurisdiction the courts of this state acquired to entertain actions of divorce was conferred wholly by statute, and their powers are confined to such as are expressed, or as may be incidental to the exercise of the jurisdiction conferred. Walker v. Walker, 155 N. Y. 77, 49 N. E. Rep. 663. Concededly, prior to this amendment the jurisdiction of the court terminated with the final judgment in divorce actions, and there was neither inherent power in, nor authority conferred by the code upon, the court to modify the judgment. Kamp v. Kamp, 59 N. Y. 220; Erkenbrach, 96 N. Y. 456. In Walker v. Walker the order increased the amount of alimony awarded by a final judgment of divorce, which was lacking in any provision reserving the power to change it; and the discussion in this court related to the effect of the section of the Code, at that time (1897), in permitting the court, after a final judgment, to annul, vary, or modify it in its direction for the payment of alimony. The argument was that the statute was remedial, and therefore should be given a liberal and retroactive effect; and while the denial of the contention was placed upon the ground that nothing indicated a legislative intent to affect judgments already entered, Judge Martin, in his opinion, added the significant remark that: "If the doctrine contended for was sustained, it would apply to the reduction of alimony in judgments existing when the amendments were adopted, as well as to its increase. If such an effect was given to them, their constitutionality might well be doubted, as they might affect the vested rights of the party."

The argument now made is that the provision for alimony "does not constitute a vested right belonging to the wife," because as I understand the contention, alimony, being incidental to the granting of a divorce, is within the discretionary power of the court to vary according to the altered circumstances of the parties, and is but the wife's mere potential expectant right" to the particular payments as they become due. It seems to me that, in such an argument, sight is utterly lost of the nature of a decree awarding alimony, or of the right which accrues to the wife as the result of an adjudication by the court, when, in divorcing the parties from their respective marital obligations, it fixes the alimony to be paid by the husband. The marriage relation has been terminated by the decree. The wife has no future rights, and the husband is under no future obligations, such as are founded upon or spring out of the marriage relation. Judge Finch observed in matter of Ensign, 103 N. Y. 284, 8 N. E. Rep. 544, 57 Am. Rep. 717, that "the court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife, which the decree cuts off and forbids in the future." By the decree in this action the obligation before resting upon the husband for the support and education of the children and for the support of his wife was changed. It thereafter was made to rest upon the wife, and the decree adjudged that the husband should pay to her a certain, fixed sum of money, in a manner, in lieu of his previous obligation. The judgment defined and created a new obligation on his part, and as the amendment of the statute necessarily affected the wife's right to compel exact performance, and bore upon the obligation, to her possible injury, it was obnoxious to the constitutional prohibition. It would be absurd to call it remedial, as affecting merely a remedy upon the decree. Even then it would violate a substantial right of the plaintiff. It was, however, in fact, the impairment of or interference with a vested right conferred by a final judgment. The plaintiff's protection in the enjoyment of her right under the decree is not necessarily referable to the prohibition in the federal constitution against the impairment of the obligations of contracts. It is not at all necessary, for the plaintiff's purposes, that the judgment of divorce should be deemed a contract. A judgment is not a contract in the ordinary sense of an agreement reached between persons to whose terms their mutual assent has been given, and it is in that sense that the word is used in the federal constitution. State of Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211, 27 L. Ed. 936. A judgment creates an obligation of the highest nature known to the law, and it is enforceable against the judgment debtor as upon his promise to perform it, but that promise is only implied by law. The obligation is imposed. It is not assumed voluntarily. But a final judgment creates and vests substantial rights, and, if the statute were allowed this retroactive effect, a new stipulation would be imported into it, in effect, that the defendant's obligation might be changed upon showing subsequently occurring facts.

In State of Louisiana v. Mayor of New Orleans, *supra*, where it was held that a judgment of damages recovered for a tort was not a contract, in the constitutional sense, Mr. Justice Bradley, in his opinion, takes occasion to say of it that "it is founded upon an absolute right, and is as much an article of property as anything else that a party owns, and the legislature can no more violate it, without due process of law, than it can other property." In Gilman v. Tucker, 128 N. Y. 190, 28 N. E. Rep. 1040, 13 L. R. A. 304, 26 Am. St. Rep. 464, Chief Justice Ruger, delivering the opinion of this court, said: "We must bear in mind that a judgment has here been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudica-

tion the fruits of the judgment become rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect." So fixed and so inviolate are the rights secured by a judgment that any legislation which attempts to deprive a party of their absolute enjoyment must be condemned. It has been quite recently held, in accordance with a line of authorities, that legislation conferring a right to appeal from a judgment which, according to existing law, had become final, was violative of section 6 of article 1 of the state constitution, as depriving a party of his property in a vested right conferred by the judgment. Germania Sav. Bank v. Village of Suspension Bridge, 159 N. Y. 362, 54 N. E. Rep. 33. And see Burch v. Newberry, 10 N. Y. 374. It is the peculiar privilege enjoyed by the citizens of this country that the legislative body is not above the law, and that its powers are prescribed and limited by a written constitution. Their lawful contracts are beyond legislative interference, and they may not be deprived of their vested rights without due process of law. They are secure against an arbitrary exercise of governmental power which is unrestrained by the established principles of private rights. The judgment in this case, in determining that, for cause, the marriage should be dissolved, also determined with equal finality that the defendant, while released from the general duty or liability which he had been under, should pay a fixed sum during the plaintiff's life. Can it reasonably be doubted that a right was vested in the plaintiff to the receipt of the annual sums which the judgment adjudged the defendant should pay? As Judge Cullen well expressed it in his dissenting opinion at the appellate division in Walker v. Walker, 21 App. Div. 226, 47 N. Y. Supp. 518: "The plaintiff prior to the decree had a right of support. By her divorce she lost that right, and, in substitution for it, acquired a new right,—a judgment requiring the payment to her of a specific sum of money." That right, as a vested interest, is property which the legislature is powerless to devest her of. If the interest is, as it is claimed, an expectant one, in the sense that the obligation of the defendant was a continuing one to pay alimony in the future, nevertheless the interest was one fixed by the judgment, and was not a mere contingency. It was not a capacity to acquire a right to the payment of money. It was a right fixed by the judgment, and hence vested in the plaintiff.

I think enough has been said, in connection with the careful and elaborate opinion of Mr. Justice Ingraham at the appellate division, to warrant me in advising the affirmance of the order appealed from, with costs.

NOTE.—*Judgment for Alimony as a "Contract" or as "Property" Entitled to Protection from Future Modification Under the Provisions of the Constitution.*—A very interesting and puzzling question is involved in the principal case, and one for which little authority can be found,—whether a judgment for alimony is a "contract" or "property" within the federal constitution, entitling it to protection from future modification.

It is well settled that a decree for alimony in a divorce *a vinculo*, containing no reservation of the power of modification, is final, and, after the expiration of the term at which it is rendered the court cannot reduce the amount. Sampson v. Sampson, 16 R. I. 456, 16 Atl. Rep. 711, 3 L. R. A. 349; Smith v. Smith, 45 Ala. 264; Hardin v. Hardin, 38 Tex. 616; Howell v. Howell, 104 Cal. 45; Kamp v. Kamp, 59 N Y. 212; Mitchell v. Mitchell, 20 Kan. 665; Stratton v. Stratton, 73 Me. 481. In states, however, in which the statute definitely provides at the time of the granting of the divorce, that the decree may be subsequently modified by the court on good cause shown, there can be no legal objection to the right of the court to modify the decree in any manner that commends itself to his discretion after taking into consideration any changed conditions that have arisen in the circumstances of either of the parties which justify or demand a modification of the decree. This law is in force in nineteen states, many, like New York, having only recently enacted such legislation. It would serve no useful purpose to cite the several statutes, as the lawyers of each state are fully acquainted with all the written law of their own state on such subjects. Our only comment on such legislation is an expression of wonder as to why the states have been so slow in adopting it. The rule is certainly a cruel and very unjust one that will continue a burden upon a divorced husband which, after changed circumstances, he is no longer able to bear, or which for any other reason would be inequitable.

The question, however, discussed in this case is apparently a new one, no authorities exactly in point being discoverable in any of the books. The question here is as to the effect of statutes, giving the courts power to modify decrees of alimony, upon existing decrees judgments, even where there is a provision that such statutes shall be retroactive. The first objection to the retroactive effect of such statutes is that they "impair the obligation of contract;" second that constitute a taking of "property without due process of law."

The first contention is hardly tenable. The contract, if any can be said to subsist in such a case, is purely a fiction, and not such a contract which the constitution sought to protect from impairment. In Chase v. Curtis, 113 U. S. 464, 5 Sup. Ct. Rep. 559, the Supreme Court of the United States said: "It was decided by this court in the case of Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211, 27 L. Ed. 936, that a liability for a tort, created by statute, although reduced to a judgment by a recovery of the damages suffered, did not thereby become a contract, in the sense of the Constitution of the United States, forbidding state legislation impairing its obligation, for the reason that the term 'contract' is used in the constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence." In the case cited above by the learned court the following is the language of the opinion: "A judgment for damages, estimated in money, is sometimes called by text-writers a 'specialty' or 'contract of record,' because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such

legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this fiction cannot convert a transaction wanting the assent of the parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition."

The second ground is the one on which the court in the principal case relies. Is a judgment for continuing alimony "property" protected by the federal constitution? Bishop says that neither a marriage nor a judgment of divorce, or any of its incidents, is property, within the meaning of the constitution. Bishop on Marriage and Divorce, § 1430. The best argument against the position taken by the court in the principal case is that made by the three judges dissenting, therein speaking through O'Brien, J., as follows:

"The only other conceivable ground that the statute in question can be assailed as violative of the constitution must be that it deprives the plaintiff of her property without due process of law. That contention implies that this incidental provision in a judgment of divorce which the law and the courts might grant or deny at pleasure is property. It cannot be sold or transferred or bequeathed by will, or pass to next of kin in case of intestacy. It has no more of the attributes of property than the common-law right to marital support, for which it is an imperfect substitute. It must be apparent that, from the general nature and character of alimony and its limitations, it is taken out of the general law of property. It is a creation of equity, and a statute that empowers courts of equity to administer it, or reduce or modify it as to amount or otherwise, as changed conditions and circumstances may require, in order to do equity between the parties, violates none of the guaranties of the constitution for the protection of property. Will it be contended for a moment that a woman who has procured a divorce, with a large allowance of alimony, and who thereafter conducts herself morally so as to become a public scandal, has secured such a property right in the allowance that no power on earth can modify it, simply because the decree was entered prior to the enactment of the statute in question? Has she acquired such an absolute right to the allowance that the husband must keep on paying it, although he has lost all his property and the judgment virtually sends him to the poorhouse? To argue that there is no human power capable of mitigating or modifying such a situation is to my mind a most astonishing proposition, and yet it is the logical result of the plaintiff's contention in this case. Nothing would seem to be more reasonable than the proposition that the state, which once exercised the power to grant divorces, with or without alimony, by special acts, a power which it could again resume,—has still power enough left to enact the section of the code referred to as it now stands. It may take the property of the citizen by the taxing power to any extent. It may surround him with police regulations by day and by night that restrict his liberty and affect his property. But it seems, from the argument of the learned counsel for the plaintiff, that there is one thing that the state cannot touch, even to promote justice, and that is a woman's alimony, when the judgment is more than three years old. It has been often held that the courts have inherent power to open judgments and grant new trials for newly discovered evidence, and this is done long after the judgment has been entered, and even after it has been affirmed in this court, and become final. The limit of time within which this may be done is a matter that rests in the discretion of the court. It has never been held or seriously suggested that the exercise of this power invaded any constitutional immunity or disturbed any vested right, and yet it is a much broader power than that expressly conferred upon the court by the statute in question, since the latter permits the court only to modify the judgment with respect to the alimony, and then only upon new facts and conditions arising subsequent to the entry of the judgment. It is, I think, quite safe to say that it has never been held that a provision in a judgment of divorce granting alimony was either a contract or property within the meaning of the constitution."

JETSAM AND FLOTSAM.

IS THE PRINCIPLE OF THE REFERENDUM VOID IN A REPRESENTATIVE FORM OF GOVERNMENT?

Under the constitution, legislative power in the province of Ontario is vested in two authorities, of equal standing and importance — the lieutenant-governor and the house of assembly. These two are complementary, and the sphere of duty of neither tolerates interference from outside. The people at large have no place in the scheme of the B. N. A. act, which entitles them to modify, much less govern legislation which the chamber has under way, or has passed on to the lieutenant-governor, as ripe for his approval. The commonalty's influence is not suffered to be anything more than indirect, petitioning the house to enact measures in accord with their views being the chief engine they may summon to their aid.

Two principal grounds of attack upon the feature in question of the Liquor Act, 1902, as embodying something repugnant to the constitution, would seem to be afforded; the divesting by the legislature itself, through its adoption, of responsibility cast upon it, and the narrowing of the prerogative of assent by the crown to laws introduced which it causes. First, as to the house's patent evasion of burdens. Representative government, conforming in essentials with the model in the parent state, has, in this part of the sovereign's dominions, prevailed for some generations. The fundamental point of the system is that the people, guaranteed by it freedom of sufferage, accredit, by a vote in the different localities into which, for the sake of convenience, the country is divided, a particular individual to a central gathering, whom they trust to carry out their formally tabulated wishes. The electors' choice, by their action, obtains every immunity and shoulders every obligation pertaining to superintendence over the community; resignation of authority by the constituency is unqualified.

Legislation should issue from the mould into which it has been run by the house a developed cast which requires nothing beyond the lieutenant-governor's impress upon it to become serviceable; and his duties as a legislator once entered upon, it is not open to a representative, the writer maintains, to abnegate any of his functions. Nor may feelers of the type disclosed by the referendum be thrown out—expedients

of such nature for ascertaining whether he will incur blame or excite discontent by some mediated line of action utilized. The foreigner could, no doubt, be naturalized through an amendment to the constitution, but no step in that direction was taken. Profit may be had from quoting Mr. Goldwin Smith, probably the highest living authority on subjects of this kind on the continent. He says "the referendum will be a legislative act performed by a body at present unknown to the constitution, and extemporised for the purpose of relieving the government and legislature of duty which they owe to the people. When the act has been passed, and the time for putting it in operation comes, the real struggle will begin, and the difficulty of enforcement will not be diminished by the constitutional bar-sinister what the act will have as the offspring of a spurious referendum."

So far as the right to sound the people goes, what difference is there between the case of a municipality submitting a by-law to be voted upon by its inhabitants, for which no sanction is forthcoming, and the house of assembly's authorization of what was done here? Mr. Justice Street, in the course of his judgment in Davies v. Toronto, 15 O. R. 33, says: "Were it now proposed to give to the result of the proposed vote a final and binding effect, there could be no doubt as to the duty of the court to restrain it, because the attempt then would be to substitute the direct decision of the electors for that of the council to which the law has referred it, and which every person concerned is entitled to have." Could language more emphatic be used in condemnation of the course pursued with the Liquor Act, 1902? It should be mentioned that some time before this judgment was given, it had been determined by the supreme court, in Canada Atlantic v. City of Ottawa, 11 S. C. R. 365, that a council was not forced to give effect by a third reading to a favorable vote of the people upon a by-law. And in Rex v. Walsh, Mr. Justice Street, by asserting that the legislature here reserved to themselves the right to deal with the question after the vote was taken—a position vigorously disputed by counsel—acknowledges the force of his earlier decision.

Then, as to the hampering of the lieutenant-governor's free agency which the departure involves. Here was a measure, assent by him to a material part of which it was virtually ordained should on a certain event happening, be nugatory. Is not the representative of the king absolutely privileged to demand that every bill which survives a third reading should be presented to him for his assent, and to anticipate that, when such has been given, it will not be defeated by the interposition of another power? Suppose the legislature were to provide for its opening or prorogation by the lieutenant-governor being dispensed with, could it be questioned that, if such abridgment of his rights had been attempted, any law it should proceed to frame, or had already framed, would be invalid? Does not a similar consequence follow where his assent to a piece of legislation depends for its efficacy on some other body? Take the analogy of a court of justice. How would it be, should entry by a judge on the verdict of a jury be contingent upon a third voice being heard? Our polity, it would seem, has been asked to receive, in the person of this intruder, a veto in disguise.—*Canada Law Journal.*

"WILFUL DEFAULT" BY A VENDOR.

The difficulty in construing the common clause in contracts of sale which requires the purchaser, in case of delay in completion, to pay interest on the purchase-money after the date fixed for completion, if the delay is due to any cause other than "wilful default" on the part of the vendor, is well known, and it is illustrated by the fact that the court of appeals have differed on the question of wilful default in Bennet v. Stone (ante, p. 278), though, upon the ground that in any case the delay was really attributable to the purchaser, they were unanimous in affirming the decision of Buckley, J. (50 W. R. 118; 1902, 1 Ch. 226). By an agreement dated in September, 1898, the defendants agreed to sell to the plaintiff certain lands for £75,000, of which £1,000 was to be paid as a deposit and the balance on the 2d of January, 1899. The purchaser was to be entitled to the rents and profits from the 25th of December, and there was a clause of the nature just stated binding him to pay interest on the purchase money if completion was delayed beyond the 2d of January. The deposit was paid, but the purchase was not completed on the day named, the immediate cause of delay being that the parties differed as to the form of conveyance. The draft conveyance submitted by the purchaser contained words assuring to him the benefit of certain covenants entered into by a third person with respect to the land. The vendors claimed to insert words restrictive of this assurance, and in June, 1899, the purchaser commenced an action for specific performance.

In this action he was successful, Buckley, J., holding that the defendants were wrong in insisting on the additional words, and judgment was given in February, 1900, or specific performance, interest to be computed on the balance of the purchase-money from the 2d of January, 1899, and an account to be taken of rents and profits received by the vendors. In working out the judgment a sum of £8,661 was found by the master to be due for interest, and the receipts in respect of rents and profits were £776 with outgoings of £7,197. The outgoings were in the main due to the fact that the tenant of the greater part of the land had given up possession, and the defendants had worked it themselves. The master's certificate was made on the 13th of January, 1901, and the purchaser took out a summons to vary it by disallowing the interest and also in other respects. But in the meantime there had been further delays in completion, and the draft conveyance was not sent in till the 5th of March, 1901, more than a year after the judgment. In the opinion of Buckley, J., the real cause of the delay was that the plaintiff had not got the money ready for the completion of the purchase, and upon the hearing of the summons to vary the master's certificate, he held that there had been no wilful default on the part of the vendors, but that, if there had been, it was not the real cause of the delay, and that consequently, the purchaser could not escape payment of interest.

It would seem that, in construing conditions which throw payment of interest on the purchaser, it does not not make any great difference whether the condition is in form absolute, so as apparently to make the purchaser liable in any event, or whether there is an exception for the case of wilful default on the part of the vendor. Even where the condition requires the purchaser to pay interest in the event of delay "from any cause whatever" this is not construed with strict literalness. The vendor is not entitled to take advantage of his own wrong, and though difficulties arising from the state of the title do not exempt the purchaser from liability, it is different where there is serious misconduct on the part of the vendor. In such a case

he cannot claim interest. Williams v. Glenton (L. R. 1 Ch. 200).

The insertion in the condition of an exception for the case of "wilful default" on the part of the vendor thus does little more than introduce a qualification which even without these words would be understood, but a considerable number of recent cases have been concerned with the question whether under given circumstances the vendor has been in fact chargeable with wilful default. In *Re* Young and Harston's Contract (34 W. R. 84, 31 Ch. D., p. 174), Bowen, L. J., gave as complete a definition as is possible, perhaps, of wilful default in the abstract. Default he said, "means nothing more, nothing less, than not doing what is reasonable under the circumstances —not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." And "wilful" merely means "that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." And the learned judge concluded: "You cannot define the words 'wilful default' more than I have defined them."

But the test of the sufficiency of an abstract proposition is its ready applicability to concrete cases, and, viewed in this light, the definition in *Re* Young and Harston's Contract has not removed all difficulty. It was held in that case that a vendor is in wilful default who goes abroad for a holiday just before the day fixed for completion, and a like result was arrived at in *Re* Hetling and Merton's Contract (42 W. R. 19; 1893, 3 Ch. 269), where the conveyance tendered by the vendors was executed on behalf of a trustee abroad under a power of attorney which they should have known was insufficient. The delay caused by obtaining execution by the trustee himself was due to their wilful default. "If," said Lindley, L.J., "a vendor knows the material facts — knows that there are difficulties which it is his duty to overcome — knows that he may not be able to overcome them by the time fixed for completion, and he fails to overcome them by that time * * * the delay caused by such failure on his part is attributable to his wilful default in the sense in which that expression is used in contracts of this description." The case seems to fall fairly enough within Bowen, L.J.'s definition. There is default in that the vendor fails to do what is reasonable, and, since he is acquainted with all the circumstance, this is wilful. But a nicer question arises where the delay is due to a mistake or oversight of the vendor. *Prima facie* there is, then, no wilful default on his part, for if his attention has not been called to the matter, his will has not had an opportunity of asserting itself. But it would be wrong to apply the above definition with too much strictness to such a case. The definition, as Lindley, L.J., pointed out in *Re* Mayor of London and Tubb's Contract (1894, 2 Ch. p. 536), presupposed knowledge of what was done and intention to do it, and Bowen, L.J., was not addressing himself to the case of an honest mistake or oversight. Where, however, the vendor has raised difficulties by a mistake as to his title which he ought not to have raised, it would not be safe to conclude that he can shelter himself under the plea that his default is not wilful. His first duty is to be acquainted with his own title, and if he omits inquiries which ought reasonably to be made, this omission is wilful and seems to involve the consequences of wilful default. In *Re* Mayor of London and Tubb's Contract, however, the mistake was held to be under the circumstances excusable and there was no wilful default.

But suppose that the vendor's mistake is not due to any question of fact or matter of title which he would in the ordinary course at once proceed to rectify, but that it is a mistake as to his rights, and that he persists in it after his attention has been called to it by the purchaser, so that litigation results. Is the consequent delay in this case due to the vendor's wilful default? Buckley, J., held in Bennet v. Stone, *supra*, that it was not. The vendors were all the time under an honest mistake as to their rights, and there was no wilful default in their continuing to assert their rights until an adverse judgment was pronounced. And the same view was taken by Cozens-Hardy, L. J., in the court of appeal. The penalty on the vendors, he pointed out, was that they had to pay costs, but they were throughout acting under an honest mistake, and they were not chargeable with wilful default so as to exempt the purchaser from his liability to pay interest. On the other hand, Vaughan Williams and Stirling, L.JJ., held that the vendor was only at liberty to shelter himself under his mistake up to the point when his attention was called to it by the purchaser. Referring to the decision in *Re* Mayor of London and Tubb's Contract, *supra*, Stirling, L.J., pointed out that it only covered the case of a mistake honestly made at first, and not persisted in when called to the vendors' attention. He held that the vendors acted unreasonably in refusing to comply with the purchaser's requirements as to the form of conveyance, and hence there was default; and, since they did this deliberately, they were guilty of wilful default. In the result this point was not material, for it was held that the delay was, in fact, due to the purchaser, but apart from this the decision would have been against the vendors. It would seem, therefore, that a vendor is guilty of "wilful default" if he delays completion by setting up an erroneous view of his own rights, notwithstanding that he acts in good faith—a result which seems fair enough as a general rule, though it does not readily accord with the ordinary idea attached to the phrase.—*Solicitor's Journal.*

CORRESPONDENCE.

THE SALE OF HONORARY DEGREES.

Many times we have had called to our attention what were termed by our correspondents and by other journals the "nefarious" methods of one, William Farr, Ph. D., LL.D., dean of the Nashville College of law. A recent communication from one of our subscribers exposes a scheme of such an inviting nature as to justify us in putting the entire profession on guard. The letter we received is as follows.

To the Editor of the Central Law Journal:

Enclosed I send some papers which I think should be given public notice. The same papers were sent to two other lawyers in this town equally "worthy jurists" with myself. I am, Yours very truly,

MALCOLM E. ROSSER.

Poteau, Ind. Ter.

Among the "papers" which Mr. Rosser encloses with his letter is a communication from the Nashville College of Law signed by William Farr, dean as follows:

Hon. Malcolm E. Rosser, Poteau, Ind. Ter.

DEAR SIR:— In accordance with a time-honored custom, the college will confer a title upon some worthy educator or jurist of your state, by bestowing the degree of doctor of laws, LL. D., and in harmony with the annual custom established by the leading American and European colleges, after long continued usage, your name has been suggested as one of ability, morality and integrity, and worthy of this distinction, and upon the presentation of the proper record of data, the title will be conferred at the coming meeting of the board of trustees. The desire of the corporation is that this honorary distinction be conferred only upon one who may, in some way prove an honor to himself, an honor to his conntry, and an honor to the college. There are no fees attached, as it is purely honorary, except the cost of the issuance of the diploma, and engrossing name in same. The college diploma bears a *fac-simile* of the corporate and state seal, is lithographed upon parchment, carefully prepared sheepskin, suitable to frame and place in the home or office, and is a testimonial of efficiency.

Please fill out the enclosed blank, record of data, and return to this office for filing purposes to be kept in the records of the college for future reference, enclosing check for the incidental fee to cover expense of the issuance of the diploma and engrossing your name in same, and it will be placed to your credit upon the books of the college, and if for any cause the title be not conferred, the incidental fee will be returned to you by the corporation.

First. Our great aim is to educate and train future lawyers. We study the law. The law is our chief text. All our studies encircle the law. We aim to make its principles plain, its doctrine luminous, and to furnish the best methods for its exposition, explanation, and illustration. We teach both the science and practice of law and equity.

We aim to send forth graduates trained in the law, graduates who know the law and are equipped with the best methods of its interpretation and can explain its principles plainly in the light of modern decisions; in short, our aim is to send forth lawyers—men and women versed in the law. Our courses of study are broad. Our work is thorough. Second. Our motto is that, we shall pass through this world but once, and therefore, any good thing that we can do or any kindness that we can bestow upon a truly worthy one, let us do it now, let us not defer it nor neglect it, for we shall not pass this way again.

Extending to you personally, and on behalf of the college, our earnest congratulations as a co-worker in the domain of the great profession, believe me, my dear sir, Faithfully yours

WM. FARR, Dean.

P. S.

The May meeting of the board of trustees will be held about the 25 inst., and your record of data, etc., should be received in advance of the meeting. You will be notified of the action of the board, and if elected to a degree, your diploma will be sent to you, otherwise, check returned. R. S. V. P.

Enclosed in this communication was a blank, entitled Record of Data, in which quite a number of seemingly irrelevant questions are asked, such as: 20. Do you believe in the co-education of the sexes in a college of law? 24. Name the church of your choice. 27. Do you take daily exercise? 28. Do you have good health? 32. Was Pope right in saying, drink deep, or taste not the Pierian spring? These are a few of the questions, the proper answers to which are supposed to entitle the applicant to the honorary degree of doctor of laws. Accompanying this blank is a notice reading as follows:

NOTE.—Record of Data for Honorary Degree must be filed with the President of the College or Dean of the Faculty before the Annual Meeting of the Board of Trustees, and (unless waived for good cause shown) be endorsed by a person holding the degree sought or one of higher rank, or signed by some Jurist, Statesman, Doctor, Minister, Educator or other reliable person of known ability and integrity, and in all cases the required incidental fee of $10 shall accompany the Record of Data to cover the expense of the issuance of the diploma and engrossing the name in same, and if for any cause the Degree be not conferred, the incidental fee shall be returned to the sender by Postal Money Order by the Corporation. — *College By-laws, Art. V., sec. 1.*

[We submit the above correspondence without comment. We would only call attention to the fact that several years ago, and even up to the present time, a man by a name very similar to that of Farr has been suspected of selling degrees of doctor of medicine and doctor of divinity. We have been given to understand that the most successful branch of this traffic has been the sale of D. D. degrees. It is probable, therefore, that many a minister of the present day is flourishing under the title of D. D. which he has had to pay for out of his meager earnings.

We have not a very strong inclination to condemn this, to say the least, most undignified business. Our contempt is greater for that man who is of such narrow mold as to desire so eagerly to stumble around in an honor too big for him. It is like a man small in stature desiring to add to his size and the dignity of his personal appearance by appearing in habiliments more suitable to a person twice his size and dignity. To be a man worthy of honor belittles every attempt to add anything by way of spurious garlands of artificial titles. What, indeed, would it add to the luster of Daniel Webster's fame to be known as an L.L.D., or that of Dwight L. Moody to have been respected as a D.D. The whole question of artificial titles and honorary degrees comes down to us from the barbaric times from which our civilization descended, when the people regarded, like the heathen of the present day, the outward show and tinsel more favorably than real merit and true virtue. How much worthier is it to win the praise of men by our manner of living and thinking than to merely attract attention and notoriety by heralding our coming by high sounding titles and interminable stretches of honorary degrees. Ed.]

BOOK REVIEWS.

VII. PROBATE REPORTS ANNOTATED.

There is a tendency, not only in the profession itself, but among law publishers as well, to specialize. The criminal lawyer, the patent lawyer, the corporation lawyer are all well known. But not so well known are the systems of law reports known as Negligence Cases, the Insurance Digest and the Probate Reports Annotated, together with some others. No better evidence that lawyers are fast developing into specialists could be presented than that there should be a sufficient demand and financial return to justify an annual digest or selection of reports on some special subject of the law.

One of the subjects of the law that is fast developing into a specialty is Wills and the Administration of Estates. Indeed, the day is not far distant when the probate lawyer will be heard of with as much frequency as the criminal or corporate lawyer is today. There is only one obstacle that looms up before us, which is at all calculated to prevent this branch of the law from becoming the most lucrative of any or all other avenues of professional activity, and that great obstacle is the multiplication of what are called trust companies. With what insidious wiles and assurances to the profession these companies have thought to appease the rising tide of opposition against them. And lawyers all over the country have allowed themselves to be hoodwinked by little presents and favors from these companies and by the latter's loud protestations that attorneys of deceased persons and of their relatives whose estates come into their hands would be retained by them. The result has been that vast estates have come into the clutches of these "soulless" corporations, who, instead of employing the personal attorneys of the deceased's family, transact the business of the estate through hired clerks whom they employ at the rate of twenty-five dollars a week, and for this service collect the enormous percentage fees allowed to executors and administrators under the law in force in most of the states. If there were any advantages resulting from this innovation, no cause for complaint might be apparent, but where the large amount of the administrator's fee goes to a stranger instead of some member of the deceased's family, and the legal matters connected with the estate, for which this exorbitant fee is paid, are looked after by mere clerks in nowise interested in the family of the deceased, and where the family, if hard pressed during the period of administration, must comply with every technicality of the law before they can obtain an advance, the disadvantages and loss to the estate and the deceased's family are very evident. The business of the profession at this time should be to oppose strongly the further extension of this dangerous innovation, and the abolishment, also, of another dangerous practice, —the employment of laymen as attorneys. In the first place, statutes should be passed in every state prohibiting corporations from acting as administrator or executor of estates. In the second place, the law should prohibit any layman from practicing in the probate court as an attorney. This would not prohibit executors, administrators or guardians of small estates who desire to manage them themselves from doing so, but would expel from practice that large class of shysters and notaries who feed upon the ignorance of the people and endanger every estate they touch by their inaccurate and bungling methods.

However, we have gotten a little outside of our subject. The system of reports which we have for review at this time have — as we suggested — to do with probate law exclusively. The reports included within these volumes are of cases of general value decided in the courts of the several states on points of probate law. Each volume gives about one hundred recent cases (in full) from the highest courts of the different states on all matters pertaining to the law of wills and the administration of the estates of deceased persons. For judges and practitioners in probate, surrogate and other courts in every state, these volumes will be indispensable, as presenting in its latest phase the most important points of probate law. Published by Baker, Voorhis & Co., New York.

HUMOR OF THE LAW.

When you ask the automobile enthusiast about it he grins cheerfully, and then tells the following story:

"These confounded country officers seem to think that an automobile is some sort of an awful monster that eats little children, causes the potato blight and drives all the rain out of the country. Besides, I have an impression that they are aware that the owner of 'mobe is apt to have money and look upon him as a good thing. Certain is it that I have found myself continually in trouble through breaking some ridiculous law that these country towns have simply to catch strangers unaware and get the contents of their pocketbook. Last week I was passing through a small town at a snail pace when the village constable ran out and announced that I was under arrest.

"'What for?' I asked, in amazement.

"'Exceedin' speed limit,' he answered. 'You'll have to come along with me.'

"While we were having it hot and heavy the village justice of peace came along and ordered the constable to bring me into court.

"'Guess we might as well ride there with you, mister,' said he, climbing in. 'I ain't never rid in one of these here machines, besides we need it ez evidence.'

"'Jump in,' said I, an idea suggesting itself to me.

"He did so, and then I let the 'mobe out for all she was worth, and there isn't a machine that can go any faster, if I do say it.

"'Stop her, gol dern ye!' yelled the justice of the peace, 'we've gone past the court room already! Stop her or I'll have ye up for contempt of court!'

"'I can't stop her!' I shouted back, with a cheerful disregard of the truth; 'she's running away.'

"Twelve miles out of town, I allowed the machine to slow down.

"'You'd better jump!' I shouted, 'she's going to explode in a minute!'

"And jump they did. The justice landed on his held in a mud puddle. I didn't see how the constable made made out. I hope they enjoyed the walk home."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT INSURANCE—Notice.— The stipulation in an accident policy as to notice by the insured held not to include a case where the insured is incapacitated by reason of his injuries to give the notice.—Comstock v. Fraternal Accident Assn., Wis., 93 N. W. Rep. 22.

2. ACCOUNT, ACTION ON—Indebtedness of Plaintiff.—In an action on an alleged mutual account, the items of indebtedness of plaintiff to defendant need not be set forth with the same particularity as those of the defendant to the plaintiff.—Wagener v. Steele, Ga., 43 S. E. Rep. 403.

3. ADVERSE POSSESSION—Record.— Actual possession of part of the land described in a deed, improperly recorded for insufficient attestation, will not extend to the balance of the real estate embraced therein.— Baxley v. Baxley, Ga., 43 S. E. Rep. 436.

4. ADVERSE POSSESSION — Springs.—Where, the fencing of a spring on plaintiff's land by defendant was not in the assertion of a right in defendant thereto, it did not constitute adverse possession.—Hunter v. Emerson, Vt., 53 Atl. Rep. 1070.

5. ALIENS—Right of Philippino Electing Allegiance to Spain to Become Naturalized.—A native of the Philippine Islands, born of Spanish parents, who did not come of age until after the expiration of the one year within which Spanish subject natives of those islands were required to give notice of their intention to retain their allegiance to Spain, and until after his arrival in this country, and who on coming of age elects to retain the nationality of his father and to remain a subject of Spain, is to be regarded as an alien, and is entitled to become a citizen of the United States through the regular channels which the law has provided, by complying with the general naturalization laws. — United States v. Young, D. C. App., 31 Wash. Law Rep. 276.

6. APPEAL AND ERROR — Bill of Exceptions.— Under Civic Code, § 5881, it is necessary that a pauper affidavit be filed with the clerk of the trial court before the bill of exceptions and transcript of the record are transmitted to the supreme court. — Smith v. State, Ga., 43 S. E. Rep. 440.

7. APPEAL AND ERROR — Evidence. — Document purporting to be a brief of evidence, interspersed with statements and arguments of counsel and rulings on evidence, with long documents attached, will not be treated on appeal as a brief of evidence. — Graham v. City of Baxley, Ga., 43 S. E. Rep. 405.

8. APPEAL AND ERROR—Evidence.—Where the deductions drawn from the facts by the jury are clearly erroneous, the verdict will be set aside on appeal.— Jeffrey v. United Order of Golden Cross, Me., 53 Atl. Rep. 1102.

9. APPEAL AND ERROR—Exceptions.— An item in the commissioner's report, not having been excepted to or passed on by the lower court, will not be considered on appeal.—Jackson v. Pleasanton, Va., 43 S. E. Rep. 573.

10. APPEAL AND ERROR—Exception.— When objection to the testimony is made after it has been received, an exception to an order overruling it will not be sustained. —Beaman v. Ward, N. Car., 43 S. E. Rep. 545.

11. APPEAL AND ERROR—Findings of Fact.— Failure of appellant to except to the findings of fact or print them in his brief held no ground for dismissing the appeal.— Payette v. Ferrier, Wash., 71 Pac. Rep. 546.

12. APPEAL AND ERROR—Res Adjudicata.—The decision as to *res adjudicata* on a former appeal is the law of the case.—Payette v. Ferrier, Wash., 71 Pac. Rep. 546.

13. APPEAL AND ERROR — Transcript. — If the parties proceed on the theory that the appeal from county court has been perfected, they cannot question the sufficiency of the transcript in the supreme court. — Coleman v. Spearman, Snodgrass & Co., Neb., 93 N. W. Rep. 983.

14. ATTACHMENT—Dissolution.—Where an attachment issues for the whole amount claimed in several causes of action, and before trial some of such causes of action are dismissed, a motion to dissolve the attachment should be granted.—First Nat. Bank v. Van Doren, Neb., 93 N. W. Rep. 1017.

15. ATTACHMENT—Process. — Where a bank clerk appropriates the money of the bank, it may waive the tort, sue on an implied contract, and attach his property, where he is a non-resident, under Gen. St. 1901, § 4624.— Lipscomb v. Citizens' Bank, Kan., 71 Pac. Rep. 583.

16. ATTORNEY AND CLIENT — Disbarment.—Upon an application for reinstatement of an attorney who has been disbarred, proof must overcome the former adverse judgment as to the applicant's character.—*In re* Simpson, N. Dak., 93 N. W. Rep. 918.

17. BANKS AND BANKING — Action on Check. — An agreement by a bank to honor checks for horses, the bank to be secured by a draft and bill of lading, held not invalid by the fact that the drawers were already indebted to the bank on other transactions. — Falls City State Bank v. Wehrlie, Neb., 93 N. W. Rep. 994.

18. BENEFIT SOCIETIES—Death of Member.—Administratrix a member of mutual benefit association held entitled to sue to recover fund payable to the "heirs" of the deceased member.—Pfeifer v. Supreme Lodge Bohemian Slavonian Benev. Soc., N. Y., 66 N. E. Rep. 108.

19 BENEFIT SOCIETIES—Per Capita Tax.—A per capita tax collected by a state council of a fraternal society from its members held not impressed with a trust in favor of the national council, unless assessed and collected for the purpose of meeting the demands of the national council. — National Council of Junior Order of United American Mechanics of United States v. State Council of Junior Order of United American Mechanics of New Jersey, N. J., 53 Atl. Rep. 1082.

20. BILLS AND NOTES — Assignment. — The words, "assigned with recourse," indorsed on a note merged into judgment to the knowledge of the assignee, with the assignment of the judgment, held to create no liability other than that of indorser.— Redden v. First Nat. Bank, Kan., 71 Pac. Rep. 578.

21. BILLS AND NOTES— Corporation's Accommodation Indorsements as Against Bona Fide Holders.—Whether or not an ordinary trading corporation has implied power to indorse negotiable paper for accommodation merely, the defense of want of authority is unavailable where the party acting upon the faith of that indorsement had no notice of the fact.— Willard v. Crook, D. C. App., 31 Wash. Law Rep. 177.

22. BILLS AND NOTES—Non-Negotiable Note.—Where, in an action by an indorsee of a non-negotiable note, he produces the note, with proper indorsements to him, at the trial, he will be presumed to be the owner thereof. —Beaman v. Ward, N. Car., 43 S. E. Rep. 545.

23. BURGLARY — Verdict. — On a presentment for burglary, a verdict, "We, the jury, find the defendant guilty of a misdemeanor," held so uncertain that no legal judgment could be rendered thereon.—Smith v. State, Ga., 43 S. E. Rep. 440.

24. CARRIERS — Contract to Carry Goods. — Where a railroad company ratifies a contract to carry goods made by a local agent in violation of its rules, it is bound to perform.—Porter v. Raleigh & G. R. Co., N. Car., 43 S. E. Rep. 547.

25. CARRIERS— Contributory Negligence. — Where an old, infirm passenger was thrown down by the premature starting of a street car, his act in grabbing the running board, by reason of which he was dragged, held not contributory negligence.—Indiana Ry. Co. v. Maurer, Ind., 66 N. E. Rep. 156.

26. CONSTITUTIONAL LAW — Due Process of Law.— Judgment for alimony constitutes property of wife, of which she cannot be deprived without due process of law.—Livingston v. Livingston, N. Y., 66 N. E. Rep. 123.

27. CARRIERS—Illegal Arrest. — Though an arrest of a passenger by an officer of the law is illegal, the carrier

held not liable for a failure to prevent the arrest, or for stopping the train to allow the officer to remove his prisoner.—Brunswick & W. R. Co. v. Ponder, Ga., 43 S. E. Rep. 430.

28. CONSTITUTIONAL LAW — Peddler's License. — The peddler's license act, Laws 1901, ch. 271, so far as it exacts the payment of a tax by non-residents from which certain residents of the state are exempted because of their residence held unconstitutional. — *In re* Jarvis, Kan., 71 Pac. Rep. 576.

29. CONTRACTS— Executory Contract. — Where, after breach by one party to an executory contract which he had partially performed, the other party elects to treat it as in full force, the former is entitled to the benefits of the contract by reason of his partial performance.—Orr v. Cooledge, Ga., 43 S. E. Rep. 527.

30. CONTRACTS—Failure to Comply With.—A party who contracted with an electric light company for power, who is injured by the failure of such company to comply with the contract, cannot recover damages against a third person, whose negligence rendered performance by the electric light company impossible.—Byrd v. English, Ga., 43 S. E. Rep. 419.

31. CONTRACTS—Public Policy.—Agreement to procure legislative action in order to depreciate price of corporate stock held void as against public policy.—Veazey v. Allen, N. Y., 66 N. E. Rep. 103.

32. CORPORATIONS — Action Against Stockholders. — The disposition of corporate estate by the corporation while winding up its affairs will not suspend limitation as to the right of action of a corporate creditor against a shareholder on his individual liability. — Jones v. Slonecker, Kan., 71 Pac. Rep. 573.

33 CORPORATIONS—Creditors — A purchaser of drafts drawn against sales made by a corporation held not a creditor of the corporation, and the delivery of such drafts after the corporation's insolvency for money received by the corporation for that purpose did not constitute a preference.— Hodson v. Karr. Md., 53 Atl. Rep. 1113.

34. CORPORATIONS—Lien on Stock. — Pledgee of bank stock held not bound by by-law of bank forbidding transfer of stock under certain conditions, or by agreement between stockholder and bank giving the latter a lien on the stock. — Just v. State Sav. Bank, Mich., 94 N. W. Rep. 200.

35. CORPORATIONS— Mismanagement. — A subsequent stockholder should not be allowed to sue for prior mismanagement of the corporation, unless the mismanagement or its effects continue and are injurious to him, or it affects him specially. — Home Fire Ins. Co. v. Barber, Neb., 93 N. W. Rep. 1024.

36. CORPORATIONS—Service of Process.—A recital in a sheriff's return that the president or other chief officer of the defendant corporation is not found authorizes service on an inferior officer. — Colorado Debenture Corp. v. Lombard Inv. Co., Kan., 71 Pac. Rep. 584.

37. CORPORATIONS— Voting Pledged Stock.—As a general rule, the right to vote pledged shares of stock remains in the pledgor until foreclosure. — Haskell v. Read, Neb., 93 N. W. Rep. 997.

38. COURTS — Sufficiency. — Courts will take judicial knowledge of the fact that a town fixed by statute as a county seat is located in the county.— State v. Buralli, Nev., 71 Pac. Rep. 532.

39. COURTS — Suits in Equity. — Applications for relief on the probate side of a county court in matters within its exclusive jurisdiction are suits in equity. — Genau v. Abbot, Neb., 93 N. W. Rep. 942.

40. CRIMINAL EVIDENCE — Bigamy. — A letter from defendant to his first wife is admissible, on a prosecution for bigamy, though written several years before his second marriage.—Crow v. State, Tex., 72 S. W. Rep. 392.

41. CRIMINAL EVIDENCE — Hearsay. — Testimony that prosecutrix told her age to defendant's brother, and that he told this to defendant, held hearsay. — Knowles v. State, Tex., 72 S. W. Rep. 398.

42. CRIMINAL EVIDENCE — Indictment. — Failure to indorse names of witnesses on indictment held not to overcome the presumption that it was based on legal and sufficient evidence. — People v. Glen, N. Y., 66 N. E. Rep. 112.

43. CRIMINAL EVIDENCE—Lewdness.—In a prosecution for lewdness, evidence of distinct offenses from that charged in indictment held inadmissible. — State v. Vance, Iowa, 94 N. W. Rep. 204.

44. CRIMINAL EVIDENCE—Statement of Co-conspirator. —Statements of a member of a crowd, in which person killed was, held inadmissible, as statements of a co-conspirator, in a prosecution for the murder. — State v. Schaeffer, Mo., 72 S. W. Rep. 518.

45. CRIMINAL LAW — Appeal. — The supreme court, on appeal from a conviction, must determine whether the evidence is sufficient to sustain the verdict in the particular case under consideration. — Patton v. State, Ga., 43 S. E. Rep. 533.

46. CRIMINAL LAW—Evidence. — Testimony of a person that he did not make "any threat" and did not offer "any inducement" before statement by accused is not mere opinion evidence —People v. Jackson, Cal., 71 Pac. Rep. 566.

47. CRIMINAL TRIAL — Admonishing Jury. — For the court to orally tell the jury, "You must not arrive at your verdict by lot or chance, but only by considering the evidence," is but an admonition, and not prejudicial. —Lankster v. State, Tex., 72 S. W. Rep. 388.

48. CRIMINAL TRIAL—Former Jeopardy. — Acquittal on indictment charging attempt to commit arson by burning a storehouse within the curtilage held a bar to an indictment for attempting to burn the same storehouse. —State v. Switzer, S. Car., 43 S. E. Rep. 513.

49. CRIMINAL TRIAL — Verdict. — That the judge in his charge omitted to instruct as to the form of the verdict, if the jury found the accused not guilty, but, on his attention being called to it, promptly supplied the omission, is not ground for a new trial.—Reeves v. State, Ga., 43 S. E. Rep. 404.

50. DAMAGES — Expectation of Life. — A requested instruction, in an action against a railroad for injuries to a servant, calling the attention of the jury, in computing damages, to the shorter expectation of life of men in the railroad business, held properly refused. — Louisville & N. R. Co. v. Gordan, Ky., 72 S. W. Rep. 311.

51. DAMAGES — New Trial. — If a judge is disqualified, the question cannot be raised for the first time on a motion for a new trial.—Berry v. State, Ga., 43 S. E. Rep. 438.

52. DEDICATION—Prescription Right.—The act of a city in laying out an extension of a street under legislative authority is not the acceptance of a way previously dedicated, where the alleged way by dedication is not identical with that actually laid out. — Chapin v. Maine Cent. R. Co., Me., 53 Atl. Rep. 1105.

53. DEDICATION—Rights of Grantor.—An owner of land subject to a deed of trust held to have no right to dedicate any part of the land to the public as a street, as against the creditor or purchaser, under foreclosure of the deed. — Newport News & O. P. Ry. & Electric Co. v. Lake, Va., 43 S. E. Rep. 566.

54. DISMISSAL AND NON-SUIT—Discretion.—The district court may, in its sound discretion, permit plaintiff to dismiss after submission to the jury or court.—Bee Bldg Co. v. Dalton, Neb., 93 N. W. Rep. 930.

55. DISORDERLY CONDUCT — Indictment. — An indictment charging that accused used vulgar language in the presence of a female, by delivering to her the written communication set out in the indictment, charges no offense under Pen. Code, § 396. — Williams v. State, Ga., 43 S. E. Rep. 436.

56. EASEMENTS — Removing Obstruction. —A party aggrieved may peacefully remove an obstruction from an easement without committing an illegal act. — Keplinger v. Woolsey, Neb., 93 N. W. Rep. 1008.

57. EMBEZZLEMENT—Constitutional Law.—Under Pen. Code, §§ 507, 512, held that, to constitute embezzlement, conversion to defendant's use temporarily is enough.—People v. Jackson, Cal., 71 Pac. Rep. 566.

58. EMINENT DOMAIN — Enforcement. — An owner of land condemned for public use held to have a lien thereon for the payment of the award, enforceable in equity.—Southern Ry. Co. v. Gregg, Va., 43 S. E. Rep. 570.

59. ESTOPPEL — Breach of Contract. — The question whether a party is estopped from recovering for a breach of contract does not arise unless the estoppel is pleaded.—Adams v. Adams, Ind., 66 N. E. Rep. 153.

60. EVIDENCE—Next of Kin.—Depositions in an action for wrongful death, some years previous to the final decision, showing next of kin to be then alive, carry a presumption of their existence at the time of the verdict.—Chicago, R. I. & P. R. Co. v. Young, Neb., 93 N. W. Rep. 922.

61. EVIDENCE—Written Instrument.—A paper received from one person, bearing his signature and that of another, held to require proof of the other's signature.—Baum v. Rainbow Mining, Milling & Smelting Co., Oreg., 71 Pac. Rep. 538.

62. EXECUTION — Proceedings for Deed. — A levy and sale under a judgment, within 20 years of its date, of property belonging to the judgment debtor, will give the execution plaintiff a lien on such property. — Hawkeye Ins. Co. v. Maxwell, Iowa, 94 N. W. Rep. 207.

63. EXECUTION—Rights of Purchaser.—A purchaser at execution sale, subject to a mortgage, bought simply the right to redeem the land by paying the mortgage debt.—Steele v. Walter, Pa., 53 Atl. Rep. 1097.

64. EXECUTION — Setting Aside Sale. — Where defendant purchased land from the purchaser at an execution sale, knowing that such sale had been set aside by the court, he cannot claim the land as an innocent purchaser —Day v. Johnson, Tex., 72 S. W. Rep 426.

65. EXECUTORS AND ADMINISTRATORS — Ancillary Administration. — The probate court held to be without jurisdiction to consider the question of the general solvency of a non-resident deceased, and to order the ancillary administrator to pay over assets to the principal administrator, so that all creditors shall receive an equal per cent.—Lewis v. Rutherford, Ark., 72 S. W. Rep. 378.

66. EXECUTORS AND ADMINISTRATORS — Assignability of Widow's Quarantine. — A widow's right of quarantine may be assigned, and an action of ejectment may be defended thereon. — Phillips v. Presson, Mo., 72 S. W. Rep. 501.

67. EXECUTORS AND ADMINISTRATORS — Contract of Sale. — Executor and trustee, having power under a will to sell real estate, may, with full knowledge of the facts, authorize attorney to contract for him. — Gates v. Dudgeon, N. Y., 66 N. E. Rep. 116.

68. EXECUTORS AND ADMINISTRATORS—Death of Mortgagee. — Where a mortgagee sued the mortgagor and others in foreclosure, and died pending the action, his executor must make the mortgagee's heirs at law parties.—Hughes v. Gay, N. Car., 43 S. E. Rep. 539.

69. EXECUTORS AND ADMINISTRATORS — Sale of Assets. — An administrator cannot sell the interest of the estate in an executory contract for the purchase of lands, except after a license from the court. — Hovorka v. Havlik, Neb., 93 N. W. Rep. 990.

70. EXTRADITION — Indictment. — The fact that one demanded by requisition is shown by the papers to have fled prior to the commission of some of the crimes charged in the indictment held not to show that she was not a fugitive as to other crimes than charged. — State v. Clough, N. H., 53 Atl. Rep. 1086.

71. FALSE IMPRISONMENT — Admissibility of Evidence. — In an action for the assault and false imprisonment of a boy alleged to have been stealing cherries, evidence as to other raids on the cherry tree held immaterial. — Golibart v. Sullivan, Ind., 66 N. E. Rep. 188.

72. FIRE INSURANCE — Premium. — Receiving the premium after destruction of all the insured property waives a provision that the insurer shall not be liable for a loss occurring before payment of the premium.—German Ins Co v. Shader, Neb., 93 N. W. Rep. 972.

73. FRAUD — Indictment.—On an indictment for fraud, the facts constituting the fraud must be alleged in the pleadings, and a mere statement of the illegality of the act charged is insufficient —State v. Jaques, S. Car., 43 S. E. Rep. 515.

74. FRAUDS, STATUTE OF—Memorandum.—The signing and delivery by the vendor, and the acceptance by the vendee, of a memorandum of an oral contract for the sale of land, held to make it binding on both parties.—Mull v. Smith, Mich., 94 N. W. Rep. 183.

75. FRAUDULENT CONVEYANCES—Chattel Mortgages.—Where a mortgagor of chattels in possession sells the goods in the ordinary course of trade for his own benefit, the mortgage is fraudulent as to creditors. — Block v. Fuller, Neb., 93 N. W. Rep. 1010.

76. FRAUDULENT CONVEYANCES—Homestead.—Where above any valid incumbrances on a homestead there is a surplus in excess of $2,000 within the homestead limits, a conveyance of such surplus can be set aside when made in fraud of creditors. — Brown v. Campbell, Neb., 93 N. W. Rep. 1007.

77. GUARDIAN AND WARD — Medical Attendance. — A guardian of minor held not liable for medical services for ward.—Leach v. Williams, Ind., 66 N. E. Rep. 172.

78. HABEAS CORPUS—Fugitive from Justice.—A finding by the governor that a person demanded by requisition was a fugitive is not conclusive, but may be reviewed by the court on *habeas corpus*.—State v. Clough, N. H., 1086.

79. HIGHWAYS—Carriage Block as an Obstruction.—An ordinary carriage block or stepping stone located just inside the curb of the sidewalk in front of a building is not an unlawful obstruction of the sidewalk, within the meaning of §§ 222, 225-227 and 229, R. S. D. C.; and the District of Columbia is not liable for injuries received by a person in stumbling and falling over the stone.—Wolff v. District of Columbia, D. C. App., 31 Wash. Law Rep. 257.

80. HIGHWAYS — Notice of Proceedings. — A wife, occupying with her husband a homestead, the legal title to which is in the latter, is not an owner of the land, within Gen St. 1901, par. 6019, requiring notice of proceedings to establish a highway to be served on the owner.—Mathewson v. Skinner, Kas., 71 Pac. Rep. 580.

81. HIGHWAYS—Repairs by Counties.—Counties which have adopted the township organization act are thereby taken out of the operation of Laws 1889, ch. 7, § 4, making them liable for damages by the want of repair of highways.—Goes v. Gage County, Neb., 93 N. W. Rep. 923.

82. HOMICIDE—Intent to Kill.—A person found guilty of shooting with intent to kill cannot claim leniency because of his inferior marksmanship.—Parker v. State Neb., 93 N. W. Rep. 1037.

83. HOMICIDE—Reasonable Doubt.—Evidence of identification solely by the voice held to leave room for reasonable doubt.—Patton v. State, Ga., 43 S. E. Rep. 533.

84. HUSBAND AND WIFE—Action for Assault.—Where a wife committed an assault in the presence of her husband under coercion, he alone was liable in damages.—Edwards v. Wessinger, S. Car., 53 S. E. Rep. 518.

85. HUSBAND AND WIFE—Contract of Married Woman. —A married woman can contract to render to a partnership services to be performed by her husband as a traveling salesman.—Orr v. Cooledge, Ga., 43 S. E. Rep. 527.

86. HUSBAND AND WIFE.—Conveyance to Wife. — The burden of proof is on the husband to show that a gratuitous transfer from his wife was freely made.—Hovorka v. Havlik, Neb., 93 N. W. Rep. 990.

87. HUSBAND AND WIFE—Neccessities—Medical attendance to a husband is a family necessity within Comp. St.,

ch. 53, § 1, rendering the property of a wife liable for a debts contracted for necessaries of the family.—Leake v. Lucas, Neb., 93 N. W. Rep. 1019.

88. HUSBAND AND WIFE.—Pledging Wife's Stock.—A mere statement of a husband that he is authorized to pledge wife's stock for his debt is insufficient to prove his authority to do so.—Just v. State Sav. Bank, Mich., 94 N. W. Rep. 200.

89. INDICTMENT INFORMATION—Defective Description.—A defective description of the grand jury in the body of an indictment may be cured by the title and preamble. State v. Buralli, Nev., 71 Pac. Rep. 532.

90. INJUNCTION—Allegation of Injunction.—An injunction will not be granted unless it appears that the viola lation of plaintiff's rights is of such a nature that it will be attended with substantial and serious damage.—Hart v. Hildebrandt, Ind., 66 N. E. Rep. 173.

91. INJUNCTION—Garnishment—A suit in equity may be maintained to enjoin a judgment creditor from prosecuting a multiplicity of proceedings in garnishment to subject exempt wages to the payment of his judgment.—Siever v. Union Pac. R. Co., Neb., 93 N. W. Rep. 943.

92. INJUNCTION—Ordinances.—A bill for an injunction to restrain the mayor and city council from changing the use of a school building held demurrable for failure to show that complainants had any special interest in the subject.—Davidson v. City of Baltimore, Md., 53 Atl. Rep. 1121.

93. INJUNCTION—Reference.—Order of reference on dismissal of case held not to leave question of dissolution of temporary injunction open to only amount of damages.—Lewis v. Jones, S. Car., 43 S. E. Rep. 525.

94. INJUNCTION—Sufficiency—To warrant injunction it is not sufficient to merely allege in general terms that the injury will be irreparable.—Porter v. Armstrong, N. Car., 43 S. E. Rep. 542.

95. JUDGMENT—Conversion.—In conversion, where it was claimed that the plaintiff delayed ascertaining her ownership to the property so long as to amount to an estoppel, the jury should consider the mental condition of plaintiff.—Guernsey v. Fulmer, Kan., 71 Pac. Rep. 578.

96. JUDGMENT—Exemplary Damages.—Where two persons are injured by negligence, each may sue for and recover exemplary damages for intentional wrong.—Griffin v. Southern Ry., S. Car. 43 S. E. Rep. 445.

97. JUDGMENT—Personal Injuries.—Judgment against a city in an action for personal injuries held not *res judicata* as to an individual sued jointly with the city, but in whose favor a plea of limitations was sustained.—City of Richmond v. Sitterding, Va., 43 S. E. Rep. 562.

98. JURY—Qualification of Juror.—Where the court is in doubt as to the qualification of a juror, it is not error to excuse him.—State v. Buralli, Nev., 71 Pac. Rep. 532.

99. JUSTICES OF THE PEACE—Appearance of Parties.—The failure of the plaintiff to appear in justice's court on the return day works a discontinuance of the action.—Purdy v. Law, Mich., 94 N. W. Rep. 182.

100. LANDLORD AND TENANT—Holding Over.—Where a tenant, after refusing to renew at an advanced rent, occupied a part of the premises for two months, payment of the advanced rent for two months hold not an admission that the tenancy continued longer.—Landsberg v. Tivoli Brewing Co., Mich., 94 N. W. Rep. 197.

101. LARCENY—False representations.—Where one by false representations induces another to sell him personalty on credit, the intent being that the title shall pass, there is no larceny.—Foster v. State, Ga., 43 S. E. Rep. 421.

102. LIBEL AND SLANDER—Plea of Justification—In an action for slander, a plea of justification is good without alleging that the defamatory words were spoken with good motives or for justifiable ends.—Larson v. Cox, Neb., 93 N. W. Rep. 1011.

103. LIFE INSURANCE—Representations of Agent.—Statement of insurance agent that certain notice would be given "of anything to be paid under the policy," held not to cover annual dues.—Riddick v. Farmers' Life Assn., N. Car., 93 S. E. Rep. 544.

104. LIFE INSURANCE—Warranties.—Where payment of a life policy is resisted on the ground that the statements in the applications as to bodily health were untrue, it is immaterial whether they were warranties or representations.—Jeffrey v. United Order of Golden Cross, Me., 53 Atl. Rep. 1102.

105. LIMITATIONS—Shortening Period on Accrued Cause of Action.—It is essential that statutes shortening the period of limitation allow a reasonable time after they take effect for commencement of suits upon existing causes of action, though what shall be considered a reasonable time must be settled by the judgment of the legislature; and the courts will not inquire into the wisdom of its decision unless the term allowed is so manifestly insufficient that the statute becomes a denial of justice.—Gwin v. Brown, D. C. App., 31 Wash. Law Rep. 238.

106. LIMITATION OF ACTIONS—Principal and Agent.—Where an agent pleaded limitations to an action by his principal for fraud, the burden was on the agent to prove the principal's knowledge of the fraud beyond the time limited.—Faust v. Hosford, Iowa, 93 N. W. Rep. 58.

107. LIMITATION OF ACTIONS—Recording Deed.—The recording of a deed alleged to be fraudulent gives such notice of its character as will bar an action to set it aside, unless commenced within five years.—Fuller & Johnson v. McMahon, Iowa, 94 N. W. Rep. 205.

108. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, a discharge by the committing magistrate is evidence of want of probable cause, but does not shift the burden of proof.—Noblett v. Bartsch, Wash., 71 Pac. Rep. 551.

109. MANDAMUS—Police Officer's Salary.—An application by a police officer for *mandamus* to compel the payment of the salary of his office will not be granted where it fails to show a definite salary attached to the office.—Moores v. State, Neb., 93 N. W. Rep. 986.

110. MASTER AND SERVANT—Assumption of Risk.—A master is not bound to use reasonable care to prevent the servant from assuming the risks of the employment.—Gallman v. Union Hardwood Mfg. Co., S. Car., 43 S. E. Rep. 424.

111. MASTER AND SERVANT—Assumption of Risk.—If a servant on account of his youth, and because of the want of instruction, fails to appreciate the risks involved in certain labor which he is commanded to perform, and is injured, the master will be liable.—Ittner Brick Co. v. Killian, Neb., 93 N. W. Rep. 951.

112. MASTER AND SERVANT—Contract of Employment. Where service under a contract of employment for a fixed period continues after such period has expired, it is presumed to be under the same contract; but this presumption must yield to evidence showing a change of terms.—Home Fire Ins. Co. v. Barber, Neb. 93 N. W. Rep. 1024.

113. MASTER AND SERVANT—Independent Contractor.—The construction of the brickwork of a house held not to make the owner of the house liable for injuries caused to a pedestrian by an obstruction placed in the street by an independent contractor doing the brickwork.—City of Richmond v. Sitterding, Va., 43 S. E. Rep. 562.

114. MASTER AND SERVANT—Injury to Employee.—Where an employee was put to work by a vice-principal at a machine which was latently dangerous, and, being ignorant of the character of the machine, was thereby injured, the master was liable.—Brower v. Timreck, Kan., 71 Pac. Rep. 581.

115. MASTER AND SERVANT—Negligence of Fellow-servant.—Negligence of an engineer in charge of the hoisting apparatus in a mine held to be the proximate cause of an injury to a miner.—Princeton Coal & Mining Co. v. Roll, Ind., 66 N. E. Rep. 169.

116. MASTER AND SERVANT — "Res ipso loquitur."— Where no explanation is given as to the cause of the fall of a brick arch on an employee, the maxim "*Res ipso loquitur*" applies. — Chenall v. Palmer Brick Co., Ga., 43 S. E. Rep. 444.

117. MECHANICS' LIENS — Leasehold Interest.— A mechanic's lien held to attach to a leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest.—Zabriskie v. Greater America Exposition Co., Neb., 93 N. W. Rep. 958.

118. MECHANICS' LIENS— Waiver. — The right of a mechanic's lien is not lost by the delivery by the claimant of an order to a third party, where there is no evidence that the latter accepted it or acted thereon.— Omaha Oil & Paint Co. v. Greater America Exposition Co., Neb., 93 N. W. Rep. 963.

119. MECHANICS' LIENS—Waiver of Lien.—A materialman who makes an entire contract for a lump sum to furnish lienable and non-lienable articles for the fitting up of a store building thereby waives his right to a lien.—Rinzel v Stumpf, Wis., 93 N. W. Rep. 86.

120. MECHANICS' LIENS — When Allowed.— One furnishing, under a running account with the common owner of a group of exposition buildings, illuminating materials, held entitled to a lien on such buildings, though they are not all situated on contiguous lots.— Lehmer v. Horton, Neb., 93 N. W. Rep. 964.

121. MINES AND MINERALS— Right to Construct Railroads.—A lease of a coal mine held to give, by implication, the right to lay a railroad track to the mine, notwithstanding a restriction therein as to use of the land. —Ingle v. Bottoms, Ind., 66 N. E. Rep. 160.

122. MORTGAGES—Authority of Agent —Where a mortgagee sold the note and acted as agent for the assignee, and an agent was appointed by him to collect the interest and the principal, a payment by the mortgagor to such substituted agent was a payment of the note.— Breck v. Meeker, Neb., 93 N. W. Rep. 993.

123. MORTGAGES—Execution Sale.— Bill by purchaser at execution sale, paying mortgage, to have the satisfaction stricken off, that he might use the mortgage as a defense to a charge on the land created by will, held properly dismissed.—Steele v. Walter, Pa., 53 Atl. Rep. 1079.

124. MORTGAGES—Foreclosure.— The foreclosure of a mortgage for the interest only, where the whole debt is due at the time, ordinarily exhausts the lien of the mortgage.—Nebraska Loan & Trust Co. v. Domain, Neb., 93 N. W. Rep. 1022.

125. MUNICIPAL CORPORATIONS— Constructive Notice of Defects in Streets and Sidewalks.—If a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that fact, and did not know it because they failed to exercise proper vigilance, then the law imputes notice to them. — Domer v. District of Columbia, D. C. App., 31 Wash. Law Rep. 248.

126. MUNICIPAL CORPORATIONS — Liability of City. — While the city can construct a drain, it will be liable for thereby diverting surface water and causing it to flow in a body on private property. — City of Valparaiso v. Keyes, Ind., 66 N. E. Rep. 175.

127. MUNICIPAL CORPORATIONS — Ordinance. — Ordinance providing for the erection of a school for a certain purpose held not to deprive the mayor and city council of the power to afterwards use the building for other purpose.— Davidson v. City of Baltimore, Md., 53 Atl. Rep. 1121.

128. MUNICIPAL CORPORATIONS — Rate of Taxes. — A taxpayer held not entitled to defeat the collection of a tax by merely showing that the city clerk extended the tax at a rate which produced more than the amount required in the appropriation ordinance.— Baltimore & O. S. W. R. Co. v. People, Ill., 66 N. E. Rep 148.

129. MUNICIPAL CORPORATIONS—Street Improvements. —Under acts 1889, p 237, § 7, no lien for street improvements can be enforced against abutting property until an assessment has been made.— Laakmann v. Prichard, Ind., 66 N. E. Rep. 153.

130. NAVIGABLE WATERS— Consent of Legislature.— A public way cannot be laid out across a navigable river without the consent of the legislature.—Chapin v. Maine Cent. R. Co., Me., 53 Atl. Rep. 1105.

131. NEGLIGENCE — Joint Wrongdoers.—Where a carrier backed a passenger car on a side track adjoining a rifle range, and a passenger was shot by the negligence of the owner of the range, the carrier and such owner were jointly liable. A release of one joint tort-feasor held a bar to a suit against the other.—Dufur v. Boston & M. R. Co., Vt., 53 Atl. Rep. 1068.

132. PARENT AND CHILD — Care of Minor Child. —The maintenance and care of a minor child include necessary medical attendance.—Leach v. Williams, Ind., 66 N. E. Rep. 172.

133. PARTNERSHIP — Breach of Agreement. — A party failing to perform his part of a partnership agreement held not entitled to claim profits which might have resulted from the successful operation of the enterprise, in a bill for an accounting. — Snyder v. O'Beirne, Mich., 93 N. W. Rep. 872.

134. PARTNERSHIP — Malicious Prosecution.—A member of a mercantile partnership is not liable for a malicious prosecution instituted by his copartner, unless he advised or participated therein. — Noblett v. Bartsch, Wash., 71 Pac. Rep. 551.

135. PAYMENT—Evidence. — That the cashier of a corporate creditor signs a receipt that a certain note is taken in payment on account held not conclusive evidence that the account is paid.— H. F. Cady Lumber Co. v. Great America Exposition Co., Neb., 93 N. W. Rep. 961.

136. POST OFFICES — Rignt of Postmaster to Exclude "Book Matter" From Second-Class Rates. —Postal regulation of July 1, 1901, § 276, in so far as it excludes from the mails as second-class matter publications "having the characteristics of books," and in requiring that the publicatisns entitled to second-class rates shall only include such as "consist of current news or miscellaneous literary matter, or both," was beyond the power of the postmaster general and void. — Houghton v Payne, D. C. App., 31 Wash. Law Rep. 178.

137. PRINCIPAL AND AGENT — Agent Retaining Property.—In case of an agent buying for his principal and advancing the price, held, that he, having wrongfully retained possession, was properly charged with rent and the principal with interest.—Jackson v. Pleasanton, Va., 43 S. E. Rep. 573.

138. PRINCIPAL AND SURETY—Liability of Surety.—The surety on a bond guaranteeing an account may show that by failure of the obligee to comply with his agreement to notify the surety if the principal ever got behind, he was prevented from protecting himself from liability.— Scarratt v. F. W. Cook Brewing Co., Ga., 43 S. E. Rep. 413.

139. PRINCIPAL AND SURETY — Release of Surety. — Where a debtor fraudulently conceals the property of an insolvent debtor so as to embarrass a surety in obtaining indemnity, it releases the latter. — First Nat. Bank v. Wilbern, Neb., 93 N. W. Rep. 1002.

140. PRINCIPAL AND SURETY—Rights of Guarantor Paying Debt as to Collateral Securities.— Where certificates indorsed in blank, with no restriction as to the use which might be made of them, and with an express authority to have all right and interest in them transferred on the books of the syndicate, or pledged as collateral security for a note, a guarantor of the note who is compelled to pay it is entitled to have such certificates delivered to him as means of indemnity for such payment. —Mankey v. Willoughby, D. C. App., 31 Wash. Law Rep. 226.

141. PROCESS — Ancillary Petition. — Where, pending litigation, defendant becomes a non-resident, service of an ancillery petition may be made by serving the attor-

ney representing the defendant in the main suit, under Civ. Code, § 4975.— Vizard v. Moody, Ga., 43 S. E. Rep. 426.

142. PUBLIC LANDS—Conclusiveness of Decision of Land Office.—Whenever congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the land office to issue a patent upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of these facts; and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack. — United States v. Hitchcock, D. C. App., 31 Wash. Law Rep. 174.

143. QUIETING TITLE—Evidence.—A deed of real estate from one not in possession, or not shown to be the owner, does not establish a title in an action to determine adverse claims. — Cartwright v. Hall, Minn., 93 N. W. Rep. 117.

144. RAILROADS— Contributory Negligence. — Where plaintiff's decedent was called upon suddenly and unexpectedly to choose between two or more ways of escaping from eminent danger, the question of his negligence is one of law for the court. — Chicago, B. & Q. R. Co. v. Lilley, Neb., 93 N. W. Rep. 1012.

145. RAILROADS — Fires.— Railroad company held liable for destruction of a building by fire communicated to cotton by sparks from a passing engine, and from the cotton to the building destroyed. — Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co., N. Car., 43 S. E. Rep. 548.

146. RAILROADS— Prescriptive Right.— A prescriptive right to cross a railroad track by virtue of an adverse public use cannot be acquired.—Chapin v. Maine Cent. R. Co., Me., 53 Atl. Rep. 1105.

147. RELEASE—Waste of Funds —Directors of a corporation cannot waste its funds, and then release themselves from liability by a release granted by themselves to a co-director. — Gilbert v. Finch, N. Y., 66 N. E. Rep. 133.

148. SALES — Failure to Deliver.— The general rule of damages for non-delivery of goods excludes the element of profits and losses.—South Gardiner Lumber Co. v. Bradstreet, Me., 53 Atl Rep. 1115.

149. SALES—Inspection after Delivery.— In an action on a contract for the sale of chattels, evidence that after delivery defendant inspected the subject-matter and retained it shows both an acceptance and a waiver of any objection as to quality.— Hazen v. Wilhelmie, Neb., 93 N. W. Rep. 920.

150. SPECIFIC PERFORMANCE—Patented Articles.—Specific performance of a contract for the invention and patenting of a machine held not to lie on the ground of injustice to one of defendants. — Booth v. Murdock, Mich., 94 N. W. Rep. 177.

151. STATUTES—Taxation.—Statutes for the exemption of property from taxation are to be strictly construed against the exemption, all doubt must be resolved in favor of the state.—*In re* Walker, Ill., 66 N. E. Rep. 144.

152. STREET RAILROADS—Ejectment.—A purchaser, on foreclosure of a deed of trust, held not estopped from maintaining ejectment against a railroad company, which had constructed its line on the land under a contract with the grantor of the deed.— Newport News & O. P. Ry. & Electric Co. v. Lake, Va., 43 S. E. Rep. 566.

153. SUBROGATION — Mortgages. — The payment of a mortgage lien by a life tenant held to entitle him to subrogation against the remainderman. — Wilder's Extrx. v. Wilder, Vt., 53 Atl. Rep. 1072.

154. TAXATION — Electric Light Company. — Electric light companies held taxable on gross receipts, under Act June 1, 1889, § 23, though part of the receipts are derived from furnishing power and from sales of electric supplies. — Commonwealth v. Brush Electric Light Co., Pa., 53 Atl. Rep. 1096.

155. TAXATION—Exemptions.—A certain building held not used exclusively for public worship, so as to be exempt from taxation under 3 Starr & C. Ann. St. 1896, ch. 120, § 2, subd. 2.—*In re* Walker, Ill., 66 N. E. Rep. 144.

156. TELEGRAPHS AND TELEPHONES — Failure to Deliver Telegram. — Telegram written on blank of a telegraph company other than defendant, and delivered to the defendant, held subject to the conditions on the blank used. — Young v. Western Union Tel. Co., S. Car., 43 S. E. Rep. 445.

157. TELEGRAPHS AND TELEPHONES — Written Notice. —In an action by a telephone company to recover from a subscriber, where he never gave any written notice of interruption of service, as required by the contract, testimony to show useless service was inadmissible. — Atlanta Standard Telephone Co. v. Porter, Ga., 43 S. E. Rep. 441.

158. TENDER—Costs Included. — The plaintiff in an action already commenced is not compelled to receive a sum of money paid into court in satisfaction of his claim, unless the sum is sufficient to include the costs to the time of payment. — McEldon v. Patton, Neb., 93 N. W. Rep. 938.

159. TRIAL — General Verdict. — A general verdict will not be set aside, because of special interrogatories, unless the special facts are so contradictory to the general verdict that both cannot be possibly true. — Indiana Ry. Co. v. Maurer, Ind., 66 N. E. Rep. 156.

160. TRIAL — Instructions. — Where a special question was submitted to a jury as to whether a certain bank acted in good faith, an answer, "We think not," was an answer in the negative. — Guernsey v. Fulmer, Kan., 71 Pac. Rep. 578.

161. TRIAL — Instruction of Court. — The court is not required to give an instruction in the exact language asked —Edwards v. Wessinger, S. Car., 43 S. E. Rep. 518.

162. TRIAL — Verdict. — The trial court has no right to refuse to receive a verdict because it contains the words "and plaintiff to pay all costs;" such words being merely surplusage.—McEldon v. Patton, Neb., 93 N. W. Rep. 938.

163. TRIAL — Verdict. — Objection to the form of a verdict must be made at its rendition.—Whiting v. Carpenter, Neb., 93 N. W. Rep. 926.

164. TRUSTS — Resulting Trusts. — The payment of a purchase-price note for land, after it was barred by limitations, by one who had signed the note with the grantee of the land, held not to entitle such payer to a resulting trust in the land. — Wilder's Extrx. v. Wilder, Vt., 53 Atl. Rep. 1072.

165. VENDOR AND PURCHASER — Executory Contract.— The wife of the vendee under an executory contract for the conveyance of land on his paying the purchase price is not a necessary party to a suit by the vendor to foreclose the vendee's equity in the land. — Schaefer v. Purviance, Ind., 66 N. E. Rep. 154.

166. WILLS — Breach of Contract. — An action on a breach of a contract to compensate the plaintiff for services by a legacy is an action which accrues at the death of the intestate, and not an action on a *quantum meruit* accruing at the time the services were rendered. —Banks v. Howard, Ga , 43 S. E. Rep. 438.

167. WILLS — Debts of Decedent.— In action by creditor of a decedent held that failure to recover against defendant for a debt of a decedent as heir at law did not preclude recovery against him as devisee. — Matteson v. Palser, N. Y., 66 N. E. Rep. 110.

168. WATERS AND WATER COURSES — Drainage.—Injunction will not issue to restrain the threatened blocking up of a depression into which the water from plaintiff's land naturally drained. — Porter v. Armstrong, N. Car., 43 S. E. Rep. 542.

169. WILLS — Undue Influence. — Undue influence is that degree of importunity which deprives the testator of his free agency, and renders the will not his free and unconstrained act. — Somers v. McCready, Md., 53 Atl. Rep. 1117.

170. WITNESSES — Reversible Error. — Where plaintiff testified through an interpreter, the overruling of an objection to a question as leading held not reversible error.—Indiana Ry. Co. v. Maurer, Ind., 66 N. E. Rep. 156.